VAGUE MADE VOGUE: THE UNCONSTITUTIONALITY OF THE PARTICULARLY SERIOUS CRIME BAR

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TABLE OF CONTENTS

INTRODUCTION

The rights of non-citizens,[1] especially non-citizens with criminal convictions, are an issue of increasing contention in the United States.[2] The ability to know what conduct results in the loss of liberty requires equal and non-arbitrary enforcement of laws and the clear definition of criminal conduct. When laws are vague, they not only enable, but actively promote arbitrary and discriminatory enforcement. Immigration laws, which arguably carry some of the most severe consequences, are plagued by this issue.[3] While vagueness is well catalogued in some areas of immigration law, it is not adequately examined on the whole.[4]

The particularly serious crime bar is an unconstitutionally vague statutory bar applied to non-citizens with criminal convictions who are facing deportation.[5] It bars consideration of certain types of

1. This Note makes the choice to refer to the population at issue, colloquially known as immigrants, as "non-citizens" throughout. Recognizing the negative history and treatment that accompanies the term "alien," non-citizens will only be referred to as "aliens" within footnotes, when statutes, judicial decisions, or other legal material are quoted and use this term.

2. *Infra* notes 139–141, 144 and accompanying text.

3. *See* Fong Hwa Tan v. Phelan, 333 U.S. 6, 10 (1948) (stating that deportation is comparable to exile).

4. One example is in the legal scholarship on the vagueness of crimes involving moral turpitude (CIMTs). CIMTs are part of immigration law and can be used to establish removability, or to show that the threshold for removal of non-citizens has been met, subject to a deportation hearing. *See, e.g.*, Derrick Moore, *"Crimes Involving Moral Turpitude": Why the Void-for-Vagueness Argument Is Still Available and Meritorious*, 41 CORNELL INT'L L.J. 813 (2008) (exploring the vagueness of CIMTs).

5. This bar is statutorily recognized in 8 U.S.C. § 1231(b)(3)(B)(ii) for withholding of removal and both 8 U.S.C. § 1158(b)(2)(A)(ii) and 8 U.S.C. § 1158(b)(2)(B)(ii) for asylum. 8 U.S.C. § 1231(b)(3)(B)(ii) states: "Subparagraph (A) [that the attorney general may not remove an alien threatened under withholding of removal] does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that-the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States;" and that "[f]or purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime." 8 U.S.C. § 1158(b)(2)(A)(ii) states: "the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a

relief from deportation—namely asylum and withholding of removal—on the grounds that non-citizens have committed a "particularly serious" crime.[6] The bar can be used to deny an applicant relief from deportation in almost any case and any circumstance.[7] It is applied by judicial discretion, and it lacks defined limit.[8] No statute expressly defines limits of the particularly serious crime bar.[9] This gives immigration judges the ability to craft a case-by-case disqualifier as they see fit, creating a slew of Due Process and Separation of Powers concerns housed under the vagueness doctrine.[10]

The vagueness doctrine is a method of analysis used by the Supreme Court to assess whether a statutory provision is

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danger to the community of the United States." 8 U.S.C. § 1158(b)(2)(B)(ii) states: "[t]he Attorney General may designate by regulation offenses that will be considered to be a crime described in clause (ii) or (iii) of subparagraph (A)." *See infra* note 26 for a discussion of how "by regulation" has been interpreted as case-by-case discretion.

6. The particularly serious crime bar does not prevent consideration of Deferral of Removal under the Convention Against Torture (CAT), but this type of relief is notoriously difficult to be approved for, with a grant rate of less than 1%. Sarah Rose Tosh, Defending the "Bad Immigrant": Aggravated Felonies, Deportation, and Legal Resistance at the Crimmigration Nexus 85 (May, 2019) (Graduate dissertation, City University of New York), https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=4329&context=gc_etds [https://perma.cc/VVZ2-L5Y5].

7. The only caveat being CAT. *See supra* note 6.

8. *See infra* notes 86–88 and accompanying text.

9. *See* 8 U.S.C. § 1231(b)(3)(B)(ii) for withholding of removal (allowing the Attorney General to determine, notwithstanding sentence length, that a non-citizen has been convicted of a particularly serious crime and not defining such crimes); *see also* 8 U.S.C. § 1158(b)(2)(B)(ii) for asylum (stating that the Attorney General can designate crimes by regulation (meaning case-by-case) as particularly serious and not defining such crimes).

10. Due Process insists that standards be provided by statute, to govern the actions of the police, prosecutors, juries, and judges. *See* Kolender v. Lawson, 461 U.S. 352, 358 (1983) (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974)) (stating that the arbitrary and discriminatory enforcement prong is important in upholding the vagueness doctrine, as where the legislature fails to provide such minimal guidelines it may allow a "standardless sweep" that lets "policemen, prosecutors, and juries [] pursue their personal predilections"). Separation of Powers concerns are clear in instances where Congress has failed to provide sufficient standards for statutory application, and has therefore delegated its duty to the other branches. *Id*; *see also* Papachristou v. City of Jacksonville, 405 U.S. 156, 165 (1972) (holding that a Jacksonville law that led to arbitrary arrests was void for reasons of vagueness).

unconstitutionally vague.[11] It requires clarity when consequences of unclear provisions could result in deprivation of liberty and arbitrary enforcement.[12] Two circuit courts have considered the vagueness of the particularly serious crime bar, yet found that it was not void for vagueness.[13] Despite the seriousness of these constitutional issues and the concerning holdings in the circuit cases, there is no scholarship illustrating how the bar is void for vagueness.[14] This Note argues that two concerns—the gravity of deportation and the due process rights afforded to non-citizens in the removability context—demand that the particularly serious crime bar be definable and limited. As it currently stands, the residual clauses[15] of the bar

11. The void for vagueness doctrine states that a statute is unconstitutionally vague where it does not provide notice to those impacted and where arbitrary or discriminatory enforcement is likely to occur. *See, e.g.*, *Papachristou*, 405 U.S. 156 at 162 (applying both prongs of the vagueness doctrine).

12. That the framers of the Constitution intended clarity in our laws is undisputed. *See* THE FEDERALIST NO. 62 (James Madison) ("It will be of little avail to the people, that the laws are made by men of their own choice, if the laws . . . undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow.").

13. Mumad v. Garland, 11 F.4th 834, 840 (8th Cir. 2021); Guerrero v. Whitaker, 908 F.3d 541, 545 (9th Cir. 2018).

14. Both the Eighth Circuit and the Ninth Circuit have addressed the issue; however, their reasoning is flawed in integral respects. *See* Alphonsus v. Holder, 705 F.3d 1031, 1042–43 (9th Cir. 2013) (wherein the Ninth Circuit considered the vagueness of the particularly serious crime bar and determined the bar was not vague under the unmistakable core approach); Guerrero v. Whitaker, 908 F.3d 541, 545 (9th Cir. 2018) (reconsidering the vagueness of the particularly serious crime bar, after the unmistakable core approach *Alphonsus* employed was invalidated by the Supreme Court, and ultimately finding that the particularly serious crime bar was not unconstitutionally vague); Mumad v. Garland, 11 F.4th 834, 840 (8th Cir. 2021) (wherein the Eighth Circuit considered the vagueness of the particularly serious crime bar and determined that it was not unconstitutionally vague because two terms provided supposedly workable limits). *But see* analysis of *Guerrero* in Emily M. Snoddon, *Clarifying Vagueness: Rethinking the Supreme Court's Vagueness Doctrine*, 86 U. CHI. L. REV. 2301, 2347–53 (2019) (applying a reformed vagueness doctrine test created by the author of that piece to the particularly serious crime bar, as an example, and still ultimately finding that it did not meet the newly proposed vagueness standards).

15. This note chooses to identify the following as the residual portions of the particularly serious crime bar. The "residual" portion of the particularly serious crime bar in the asylum context, 8 U.S.C. § 1158(b)(2)(B)(ii) states: "[t]he Attorney General may designate by regulation offenses that will be considered to be a crime described in clause (ii) or (iii) of subparagraph (A)." In the withholding context, the "residual" portion of 8 U.S.C. § 1231(b)(3)(B)(iv) states: "[t]he previous

introduce an intolerable level of vagueness. Thus, the residual clauses of the particularly serious crime bar should be found void for vagueness.

Acquiring information that substantiates the vagueness of the particularly serious crime bar is subject to significant hurdles and roadblocks.[16] Toward the goal of providing clarity, this Note analyzes a series of decisions obtained via a Freedom of Information Act (FOIA) request, where, within each case discussed, a particularly serious crime determination was made.[17] The twenty-three immigration judge decisions, examined for the first time, demonstrate significant discrepancies in the current application of the bar.[18]

Part I of this Note discusses the present applicability of the particularly serious crime bar together with its adjudicatory progression under the Board of Immigration Appeals (BIA)[19] and its Congressional history, examines the evolution and current applicability of the vagueness doctrine, and identifies prevalent arbitrary and discriminatory enforcement problems in immigration law. Part II argues that the residual clauses of the particularly serious crime bar should be found void for vagueness, analyzes the decisions received from the Executive Office for Immigration Review

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sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime."

16. *See infra*, Section II.C (reviewing FOIA request decisions to illustrate such obstacles).

17. In total, three FOIA requests were submitted. The first was withdrawn after consultation with a colleague for phrasing errors, the second was denied, and upon submission of the third, the Executive Office of Immigration Review (EOIR) agreed to meet to discuss the requested information. The final FOIA request asked for "electronic copies of case decisions by Immigration Judges on convicted criminal applicant's requests for withholding of removal, whether accompanied by other requests (such as asylum, or Convention Against Torture) or withholding only, between the period of January 1, 2019 to January 1, 2021." FOIA Request from Haylee Bunner, to Jill Anderson (Sept. 30, 2021) (on file with *Columbia Human Rights Law Review*). In the end, the EOIR agreed to release only forty decisions.

18. *See infra* Section II.B.1 (examining the inconsistencies among the twenty three decisions, including variations in the application of Frentescu factor test and the weight given to different factors). These twenty three decisions were the only decisions of the forty released that were directly responsive.

19. The BIA, as the overseeing adjudicatory body of the Executive Office of Immigration Review has the power to determine agency interpretation, and the EOIR itself has the ability to publish guidelines. *See* 8 C.F.R. § 1003.1 (codifying the organization, jurisdiction, and powers of the Board of Immigration Appeals).

(EOIR), and explains how the circuit decisions are not logically sound. Part III provides solutions by proposing that the residual clauses of the particularly serious crime bar be found unconstitutionally vague, and advocates for instituting potential enumerated regulations while also weighing the impact that mitigating factors should have.

This Note argues that Congress' original goal of crafting a narrow particularly serious crime bar has collapsed.[20] The legislative history, newly acquired substantive immigration judge decisions, and a close reading of the federal circuit court decisions makes this evident. The bar has grown increasingly vague, leaving non-citizens with criminal convictions facing uncertainty when confronted with the threat of deportation. Therefore, the ability of immigration judges to label a crime particularly serious should be definable and limited.

I. The Evolution of the Particularly Serious Crime Bar and the Void for Vagueness Doctrine

A. The Current State of the Particularly Serious Crime Bar

The particularly serious crime bar is applied by immigration judges and serves as a block to relief from deportation, specifically under asylum[21] and withholding of removal,[22] for non-citizens

20. *See infra* Section I.A.1 (reviewing the history and application of the particularly serious crime bar to support the argument that Congress intended it to be narrowly construed).

21. Asylum is a discretionary form of relief for non-citizens who fear being returned to their home country, specifically those who face a reasonable chance of persecution—defined as at least 10%—due to their membership in a particular targeted group. Relief in this context means that the non-citizen is allowed to stay in the United States despite being eligible for deportation. *See* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987) (asserting that there is "simply no room in the United Nations' definition [of well-founded fear] for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening" and listing the particular groups who may be granted asylum, as those who have a well-founded fear of persecution on account of "race, religion, nationality, membership in a particular social group or political opinion."). *Id.*, at 428, n.5 (citing INA § 208(a) which provides that "the Attorney General is not required to grant asylum to everyone who meets the definition of refugee").

22. Withholding of removal is an alternative form of non-discretionary relief granted to non-citizens that requires a showing of a greater than 50% chance of persecution based on membership in a particular targeted group, setting a much higher standard for applicants. That withholding is a non-discretionary

convicted of certain criminal offenses.[23] The particularly serious crime bar has different statutory definitions in the asylum and withholding of removal contexts, but it is the residual portions of the particularly serious crime bar that are under examination here. The main portions of the asylum statute and the withholding statute differ in that the asylum statute[24] automatically bars all non-citizens who have committed an aggravated felony from relief, while the withholding statute only explicitly bars non-citizens who have committed an aggravated felony (or felonies) with an aggregate term of imprisonment of at least five years.[25] However, the residual portions of both bars provide the Attorney General with discretion to deem any additional offense a "particularly serious crime" on a case-by-case basis.[26] Thus, under both provisions, non-citizens convicted of

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form of relief means that once this requisite chance of persecution is proven, an immigration judge is required to grant relief. *See* 8 C.F.R. § 208.16(b)(2) (2017) (indicating that the burden of proof is on the applicant to establish that it is "more likely than not" that the applicant's life or freedom would be threatened based on race, religion, nationality, membership in a particular social group or political opinion); *see also* 8 C.F.R. § 208.16(d)(1) (2017) (stating that an application for withholding of deportation or removal "shall be granted if the applicant's eligibility for withholding is established").

23. *See* 8 U.S.C. § 1158(b)(2)(A)(ii) (indicating that it is a bar to asylum); 8 U.S.C. § 1231(b)(3)(B)(ii) (indicating that it is a bar to withholding of removal); 8 C.F.R. § 1003.10(a) (2019) (stating that "immigration judges are attorneys whom the Attorney General appoints as administrative judges . . . . Immigration judges shall act as the Attorney General's delegates in the cases that come before them").

24. This Note will focus on the residual portion of the particularly serious crime bar as it relates to withholding of removal. However, all of the arguments contained within apply equally to the residual portion of the particularly serious crime bar under the asylum statute. This is because the procedure for determining what constitutes a particularly serious crime under the residual portions of the bar is exactly the same under both the withholding and asylum statutes. Where the two differ, it will be addressed in the footnotes.

25. The non-residual portion of the particularly serious crime bar for asylum statutorily bars all non-citizens with an aggravated felony conviction, as this conviction is automatically considered a "particularly serious" crime. 8 U.S.C. § 1158(b)(2)(B)(i). The non-residual portion of the withholding of removal statute classifies any non-citizen "who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime," thus any conviction meeting these terms is, by statute, automatically considered "particularly serious." 8 U.S.C. § 1231(b)(3)(B)(ii).

26. In the withholding context, the residual portion of the particularly serious crime bar states that the mandatory statutory application "shall not

crimes not explicitly listed in the statute may nonetheless be denied relief from deportation at the Attorney General's discretion.[27] This usage of the particularly serious crime bar is beyond that which is explicitly required or clearly defined by the statute, and it is implemented by immigration judges under their own discretion, acting under the power of the Attorney General.[28]

1. Evolution of the Particularly Serious Crime Bar

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preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime." 8 U.S.C. § 1231(b)(3)(B). In the asylum statute the residual portion of the bar reads "[t]he Attorney General may designate by regulation offenses that will be considered to be a [particularly serious] crime." 8 U.S.C. § 1158(b)(2)(A)(ii); 8 U.S.C. § 1158(b)(2)(B)(ii) (stating that the Attorney General can designate crimes by regulation as particularly serious); *see also* Bastardo-Vale v. Att'y Gen. United States, 934 F.3d 255, 265 (3d. Cir. 2019) (concerning the asylum statute and holding that "by regulation" does not preclude case-by-case adjudication); Gao v. Holder, 595 F.3d 549, 556 (4th Cir. 2010) (holding stating that "nothing in the [asylum] statute says that the Attorney General must use regulation to designate crimes as particularly serious"); Delgado v. Holder 648 F.3d 1095, 1098 (9th Cir. 2011) (holding that for asylum purposes, the Attorney General has the authority to designate offenses as particularly serious crimes through case-by-case adjudication in addition to regulation). *But see Bastardo-Vale*, 934 F. 3d at 270, 270–273 (McKee, J., dissenting) (stating that Congress did not need to include the limitation "by regulation" and that "[t]he fact that Congress was aware of what immigration officials had been doing for 16 years before adding 'by regulation' to the statute is perhaps the strongest argument against the majority's position," and stating that "as in *Ali* and *Delgado*, the court put on blinders and concluded that the statute does not say what it says," arguing that Congress did not intend to allow a case-by-case approach).

27. *Supra* note 26 and accompanying text.

28. *See* 8 C.F.R. § 1003.10(a) (2019) (stating that "immigration judges are attorneys whom the Attorney General appoints as administrative judges . . . . Immigration judges shall act as the Attorney General's delegates in the cases that come before them"). *See* 8 U.S.C. § 1158(b)(2)(B)(ii) (stating that the Attorney General can designate crimes by regulation as particularly serious); *see also* 8 U.S.C. § 1231(b)(3)(B) (allowing the Attorney General to determine, notwithstanding sentence length, that a non-citizen has been convicted of a particularly serious crime). Additionally, outside of these statutory sections Congress granted the Attorney General the authority to identify other offenses as particularly serious; for this, all such regulations must first pass through a rulemaking and comment period that gives notice to the public of offenses that may be designated as particularly serious. *See* Bastardo-Vale v. Att'y Gen. United States, 934 F.3d 255, 262 (3d. Cir. 2019) (holding that this ability exists but that it does not preclude case-by-case evaluation of particularly serious crimes).

The history and application of the particularly serious crime bar strongly supports the argument that Congress meant for the particularly serious crime bar to be narrowly construed. To date, the BIA has never identified the elements of a particularly serious crime.[29] An unclear and open-ended definition invariably leads to inconsistent application by judges, forcing them to rely either on their own biases, or on precedential decisions based in other judges' biases.[30] The BIA, with its practice of applying the bar broadly, has introduced more vagueness into the statute, as opposed to following their mandated role as an agency to interpret and clarify.[31] The particularly serious crime bar, as it relates to withholding of removal, has been subject to a large amount of statutory revision and judicial interpretation.[32] Each BIA-driven interpretive expansion of the list of *per se* particularly serious crimes was closely followed by Congress imposing a major limiting change, three times in total, with the current residual clauses only coming into effect with IIRIRA in 1996.[33] This consistent legislative pushback suggests that Congress

29. *See* Matter of N-A-M-, 24 I. & N. Dec. 336, 342 (B.I.A. 2007) (indicating only that the elements of an offense are what bring it "within the ambit" of particularly serious, but not stating any standards under which to consider these elements).

30. *See* Sophia Genovese, *"Vague Laws Invite Arbitrary Power": Making the Case for Crimes Involving Moral Turpitude Being Void for Vagueness*, LEXIS NEXIS LEGAL NEWSROOM: IMMIGRATION (July 23, 2018), https://www.lexisnexis.com/legalnewsroom/immigration/b/immigration-law-blog/posts/vague-laws-invite-arbitrary-power-making-the-case-for-crimes-involving-moral-turpitude-being-void-for-vagueness—-sophia-genovese [https://perma.cc/RN67-3W6A] (talking about this leapfrog of bias in the context of CIMT's when determining what is "morally reprehensible"). This same type of analysis and enabling of bias occurs within immigration judges' determinations of particularly serious crimes. *See, e.g.*, Section II.B.1.

31. Montgomery Ward & Co v. F.T.C., 691 F.2d 1322, 1328 (9th Cir. 1982) (stating that, in general, "the agency may act through adjudication to clarify an uncertain area of the law").

32. *See infra* Section I.A.1 for an illustration of the statutory revision of the residual portion of the particularly serious crime bar that relates to withholding of removal. The residual portion of the bar that relates to asylum has not seen much statutory revision, mainly undergoing judicial interpretation. *See infra* note 73 for an illustration of the judicial revision of the residual portion of the particularly serious crime bar as it relates to asylum.

33. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 305(a) (amending former section 243(h)(3)(B) of the Immigration Act of 1990) (adding the current residual portions of the withholding and asylum statutes); *see also* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, § 413(f), 110 Stat. 1214, 1269 (1996) (allowing the Attorney General to override

was attempting to rectify the overbroad application of the particularly serious crime bar.[34]

The particularly serious crime bar descends from Article 33 of the United Nation's 1951 Convention Relating to the Status of Refugees, which established the framework for the treatment of non-citizens.[35] The related section of the Protocol Relating to the Status of Refugees that followed, and was ratified by the US in 1967, focused on protecting non-citizens whose life or freedom would be threatened if they were expelled or returned to their country of origin based on their membership in a protected category. [36]

The first part of Article 33 sets out the non-refoulement principle, which states that "[n]o contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular

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the categorical application of the particularly serious crime bar to aggravated felonies); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104–208, 110 Stat. 3009–546, 627–28 (1996) (expanding the definition of aggravated felony, but also limiting the statutory application of the particularly serious crime bar for withholding of removal to aggravated felonies with a sentence of 5 or more years).

34. *See* Choeum v. INS, 129 F.3d 29, 42–44 (1st Cir. 1997) (giving credit to the argument put forth by INS that the amendments to the particularly serious crime bar in IIRIRA were motivated by wanting to limit the effect of the expansion of the aggravated felonies list); *see also* Immigration Control and Financial Responsibility Act of 1996: Hearing on S. 1664 before the S. Comm. On the Judiciary, 104th Cong. 2d sess. 60–61 (1996) (statement of Sen. Kennedy) (stating that using IIRIRA to change the *per se* rule for particularly serious crimes had created tension with the Refugee Protocol by sweeping in some "fairly minor offenses"). *But see* Delgado v. Holder, 648 F.3d 1095, 1105 (9th Cir. 2011) (arguing that "nothing in the legislative history indicates that Congress intended, by creating a categorical bar and by later relaxing that categorical bar, to eliminate the Attorney General's pre-existing authority to determine that . . . a crime was "particularly serious," whether or not the crime was an aggravated felony."). *Delgado* took Congress's silence on the reasoning for these statutory limitations as acquiescence, despite the fact that the measures Congress took significantly limited the statutory definition of what a *per se* particularly serious crime is. *Id.*

35. Convention Relating to the Status of Refugees art. 33, *adopted* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention].

36. Protocol Relating to the Status of Refugees art. 1(1), *adopted* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force November 1, 1968) [hereinafter Refugee Protocol].

social group or political opinion."[37] Article 33 was amended before publication to include that "[t]he benefit of the present provision may not, however, be claimed by a refugee whom . . . having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."[38] The United States Representative was opposed to the particularly serious crime exception to the non-refoulement principle, stating that it would be "highly undesirable to suggest in the text of that Article that there might be cases, even highly exceptional cases, where a man might be sent to death or persecution." [39] However, France and the United Kingdom insisted on the addition of such a qualifier, and it was ultimately included.[40] The United Nations High Commissioner for Refugees (UNHCR), in interpreting what constitutes a particularly serious crime, has stated that "the gravity of the crime[] should be judged against international standards, not simply by its categorization in the host State or the nature of the penalty."[41]

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37. Refugee Convention art. 33(1), *supra* note 36.

38. Refugee Convention art. 33(2), *supra* note 35. *Infra* note 40.

39. Ad Hoc Committee on Refugees and Stateless Persons, 2nd Sess., 40th mtg. U.N. Doc. E/AC.32/SR.40 (Aug. 22, 1950) (summarizing the record of the meeting which includes the U.S. Representative's comments). The Representative's statement can likely be taken as the opinion of the President and possibly members of Congress. *See* CONG. RSCH. SERV., Y 4.F 76/2, Treaties and Other International Agreements: The Role of the United States Senate 6 (2001) (commissioned by the Committee on Foreign Relations United States Senate) (stating that in the context of treatymaking "representatives of the President and other governments concerned agree on the substance, terms, wording, and form of an international agreement," that "[m]embers of Congress sometimes provide advice through consultations arranged either by Congress or the executive branch, and through their statements and writings" and that "[m]embers of Congress or their staff have served as members or advisers of delegations and as observers at international negotiations").

40. PAUL WEISS, THE REFUGEE CONVENTION, 1951: THE TRAVAUX PRÉPARATOIRES ANALYSED 234– 39 (Univ. Press, 1995).

41. U.N. High Commissioner for Refugees (UNHCR), Criminal Justice and Immigration Bill: Briefing for the House of Commons at Second Reading, paragraph 10, (July 2007), https://www.unhcr.org/en-us/576d237f7.pdf [https://perma.cc/HAF7-XDZ7] (stating that examples of a "serious crime" include "murder, rape, arson, and armed robbery" and that "[c]ertain other offences could be considered serious if they are accompanied by the use of deadly weapons, involve serious injury to persons, or there is evidence of serious habitual criminal conduct" and that the "qualification 'particularly serious' indicates that only crimes of a particularly serious nature should be considered egregious enough to warrant an exception to the non-refoulement principle"). *Id.* Petty theft or

The first implementation in the United States of a particularly serious crime bar to withholding of removal occurred when Congress enacted the Refugee Act of 1980.[42] This statutory version of the bar stated only that a non-citizen could be removed if "having been convicted of a particularly serious crime, [the non-citizen] constituted a danger to the community of the United States."[43] Neither the Refugee Act of 1980, its legislative history, nor documents expounding on the meaning of Article 33[44] offer a definition of the term "particularly serious crime."[45] In 1982, the BIA first considered the meaning of a "particularly serious crime" in the Refugee Act of 1980.[46] In *Matter of Frentescu*, the BIA created a case-by-case balancing test to examine particularly serious crimes.[47]

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possession for personal use of illicit narcotic substances do not meet the threshold of particularly serious according to the UNHCR. *Id.*, at paragraph 7, 10.

42. Refugee Act of 1980, Pub. L. No. 96–212, § 203(e), 94 Stat. 102, 107 (1980) (formerly codified at 8 U.S.C. § 1253(h)(2)(B)) [hereinafter Refugee Act].

43. *Id.*

44. These documents include both the Protocol Relating to the Status of Refugees, and the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status [hereinafter UNHCR Handbook]. The UNHCR Handbook contains the only definition of any kind of crime—a serious non-political crime—which reads, in pertinent part, "[w]hat constitutes a 'serious' non-political crime . . . is difficult to define . . . . In the present context, however, a 'serious' crime must be a capital crime or a very grave punishable act." Matter of Frentescu, 18 I. & N. Dec. 244, 247 (B.I.A. 1982); *see also* UNHCR Handbook ¶ 155, at 36 (defining a serious non-political crime as a "capital crime or a very grave punishable act").

45. *See* Refugee Act § 203(e), *supra* note 42, at 7 (stating only that "the alien, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of the United States," and not defining the term "particularly serious crime"); *see also* H.R.REP. NO. 96–781 (1980), *reprinted* in 1980 U.S.C.C.A.N. 160, 161 (illustrating the relevant legislative history and showing no particularly serious crime definition); Refugee Protocol, *supra* note 36 (lacking a definition for particularly serious crime); UNHCR Handbook, ¶ 155, U.N. Doc. HCR/IP/Eng/REV. 1 (1979, rev. 1992) (giving no definition of particularly serious crime).

46. *See* Matter of Frentescu, 18 I. & N. Dec. at 247 (stating that it is a case of first impression and listing the factors to be evaluated when judging the seriousness of a crime, which are: the nature of the conviction; the circumstances and underlying facts of the conviction; the type of sentence imposed; and, "most importantly, whether the type and circumstances of the crime indicate that the noncitizen will be a danger to the community").

47. Aggravated felonies were not then linked to the particularly serious crime bar, and the test employed in *Frentescu* did not take into account whether the crime at issue was statutorily defined as an aggravated felony. *See Frentescu*,

Under the *Frentescu* factor test, courts were to evaluate the seriousness of a crime based on four factors: "the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate[d] that the non-citizen [would] be a danger to the community." [48] The *Frentescu* court also set forth the assumption that crimes committed against persons "are more likely to be particularly serious crimes," with the qualifier that there "may be instances where crimes (or a crime) against property will be considered" particularly serious.[49]

The BIA emphasized the lack of specificity as to the meaning of "particularly serious crime," and stated that since "no administrative history or case law . . . defining or otherwise interpreting particularly serious crime" had been presented to them, they could not "set forth an exact definition of a particularly serious crime" at that time.[50]

The Board in *Frentescu*, looking to characterize the particularly serious crime bar in general terms, stated that "a particularly serious crime is more serious than a serious non-political crime," with a serious non-political crime being defined as a "capital crime or a very grave punishable act." [51] In implementing a case-by-case approach, the Board neither adopted a firm definition of what constituted a particularly serious crime, nor offered any definitive list of crimes that would fall within that classification.[52]

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18 I. & N. Dec. at 246–47 (stating that Congress did not define "particularly serious crime," and neither has administrative history or case law).

48. *Frentescu*, 18 I. & N. Dec. at 247. The last factor, "whether the type and circumstances of the crime indicate that the non-citizen will be a danger to the community," was later removed from consideration. *See* Matter of Carballe, 19 I. & N. Dec. 357 (BIA 1986) (rejecting the dangerousness analysis and finding that it is an unnecessary component of the factor test); *infra* note 84 and accompanying text (determining that sentence imposed should not be a dominant factor in the particularly serious crime analysis since other factors that are subsequent and unrelated to the commission of the crime—such as offender characteristics and cooperation with law enforcement—that may operate to reduce a sentence, but do not diminish the gravity of a crime).

49. *Frentescu*, 18 I. & N. Dec. at 247.

50. *Id.* at 246–47.

51. *Id.* at 247. However, the Board added that "many crimes may be classified both as 'particularly serious crimes' and as 'serious non-political crimes." *Id.*

52. *Id.*; *see also* Alphonsus v. Holder, 705 F.3d 1031, 1039 (9th Cir. 2013) (emphasizing that this lack of definition created difficulty when trying to

In 1986, with *Matter of Carballe*, the BIA revised the original *Frentescu* factor test, stating that it was the elements of the offense—the "nature of the crime"—that was the key in demonstrating whether a non-citizen poses a danger to the community.[53] *Matter of Carballe* thus held that a separate assessment of dangerousness was not required, although it had previously been called the "most important" factor in *Frentescu*.[54] The BIA stated that non-citizens "who have been finally convicted of particularly serious crimes are presumptively dangers to this country's community."[55]

During the period from 1990 to 1996, sweeping legislative changes took place in the immigration context.[56] In 1990, Congress designated all aggravated felonies as particularly serious crimes in the withholding of removal context through the Immigration Act of 1990, thus statutorily superseding the BIA's decision in *Frentescu*.[57] This move by Congress suggests that it meant to provide guidance and limit the particularly serious crime bar to only aggravated felonies.[58] At this time, only a small number of particularly grave

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determine whether the offense there at issue constituted a particularly serious crime).

53. *Carballe*, 19 I. & N. Dec. at 360.

54. *Id.* Thus, the "proper focus" was not on the "likelihood of future serious misconduct" but was instead on the nature of the crime of conviction. *See id.* (holding that the nature of the crime was key to the analysis, that this showed dangerousness, and that a determination of future dangerousness was not required); *see also* Matter of N-A-M-, 24 I. & N. Dec. 336, 342 (B.I.A. 2007) (affirming that future dangerousness was not the proper focus of the particularly serious crime inquiry, and that the focus should instead be on the elements of the crime committed). *But see Frentescu*, 18 I. & N. Dec. at 247 (calling the separate assessment of dangerousness the "most important" factor).

55. *Carballe*, 19 I. & N. Dec. at 360.

56. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 § 515; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 § 413; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-308, 110 Stat. 3009 § 305(a) (amending former section 243(h)(3)(B) of the Immigration Act of 1990) (adding the current residual portions of the withholding and asylum statutes).

57. Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978 § 515(a)(2).

58. *Id.* § 515(a) (codified at former section 243(h)(2) of the Act) (stating that "an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime" and only referencing aggravated felonies in relation to particularly serious crimes). *See* Matter of C-, 18 I. & N. Dec. 259, 533–34 (B.I.A. 1992) (stating that Congress provided guidance lacking

offenses were aggravated felonies.[59] In *Matter of C-*, the BIA observed that the relatively short list of aggravated felony offenses encompassed in the 1990 Act "covered the vast majority of crimes [it] would have previously determined to be particularly serious crimes."[60] However, despite this clear categorical application of the particularly serious crime bar by Congress, and the fact that Congress had superseded *Frentescu*, the BIA continued to adjudicate whether a crime was particularly serious on a case-by-case basis, ostensibly not limiting particularly serious crimes to aggravated felonies.[61]

When Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), it altered the relationship between particularly serious crimes and aggravated felonies. AEDPA expanded the definition of aggravated felonies to encompass a significantly wider range of offenses.[62] This, in turn, enlarged the scope of the particularly serious crime bar, since the bar, still unchanged from the Immigration Act of 1990, incorporated all

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at the time of *Frentescu* with Section 515(a)(2) of the Immigration Act of 1990 and that the definition of "aggravated felony" at § 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43) covered the vast majority of crimes that previously would have been determined to be particularly serious," and noting that "while 'most' of the crimes in cases 10 years ago when *Frentescu* was decided had to be analyzed on a case-by-case basis to determine if they were 'particularly serious crimes,' the opposite is now true").

59. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690, 102 Stat. 4181, 4469–70 § 7342 (1988 version of the INA) (defining "aggravated felony" as: "murder, any drug trafficking crime, . . . or any illicit trafficking in any firearms or destructive devices"); *see also* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 § 501 (adding to the list of aggravated felonies money laundering and crimes of violence for which the term of imprisonment is at least five years); Alphonsus v. Holder, 705 F.3d 1031, 1039 (9th Cir. 2013) (stating that at the time Congress passed the 1990 Act only a small number of especially grave offenses had been designated aggravated felonies).

60. Matter of C-, 18 I. & N. Dec. 529, 534 (B.I.A. 1992) (stating that this relatively short list of aggravated felonies then in existence "cover[ed] the vast majority of crimes [it] would have previously determined to be particularly serious crimes"); Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978 § 501.

61. *See* Ahmetovic v. INS, 62 F.3d 48, 52 (2d Cir. 1995) (agreeing with the BIA's conclusion that a crime did not need to be an aggravated felony to be determined to be "particularly serious").

62. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214, 1277 § 440(e).

aggravated felonies.[63] According to the Immigration and Naturalization Service (INS), it was likely that Congress then became concerned that some of these newly designated aggravated felonies "might be considered less serious than those the Protocol intended to cover" under the particularly serious crime bar.[64] AEDPA amended the Immigration Act of 1990 by giving the Attorney General discretionary authority to override the categorical bar that had designated every aggravated felony a particularly serious crime for purposes of withholding of removal.[65] This enabled the Attorney General to ensure greater compliance with the 1967 U.N. Protocol Relating to the Status of Refugees[66] and prevented the reflexive expansion of the particularly serious crime bar following the expansion of the aggravated felony definition.[67] However, it was short

63. *Id.* § 440(c); Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978 § 515(a) (codified at former section 243(h)(2) of the Act) (stating that "an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime").

64. Choeum v. INS, 129 F.3d 29, 42 (1st Cir. 1997) (presenting the INS' argument that "AEDPA expanded the definition of 'aggravated felony' to include crimes that might be considered less serious than those the Protocol intended to cover in its exclusion clause").

65. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214, 1277 § 413(f) (amending former section 243(h)(3)(B) of the Immigration Act of 1990) (giving the Attorney General the discretion to determine if a non-citizen is not deportable if "such alien's life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion" and stating that suspending deportation "is necessary to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees").

66. Refugee Protocol, *supra* note 36 and accompanying text.

67. *See* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 § 243(h) (applying the particularly serious crime determination to all aggravated felonies); *see also* U.N. High Commissioner for Refugees (UNHCR), Criminal Justice and Immigration Bill: Briefing for the House of Commons at Second Reading, ¶ 10 (July 2007), https://www.unhcr.org/en-us/576d237f7.pdf [https://perma.cc/2ZMP-CSWB] (stating that examples of a "serious crime" include "murder, rape, arson and armed robbery" and, additionally, that "[c]ertain other offences could be considered serious if they are accompanied by the use of deadly weapons, involve serious injury to persons, or there is evidence of serious habitual criminal conduct" and that the "qualification 'particularly serious' indicates that only crimes of a particularly serious nature should be considered egregious enough to warrant an exception to the *non-refoulement* principle"). Petty theft or "possession for personal use of illicit narcotic substances" does not meet the threshold of "particularly serious" according to the UNHCR. *Id.* at ¶ 7, 10.

lived, as the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 followed soon after.

When Congress passed IIRIRA in 1996,[68] the list of crimes designated as aggravated felonies was expanded again, primarily by reducing, from five years to one, the minimum penalty necessary for several offenses to qualify as aggravated felonies.[69] However, to avoid a simultaneous expansion of the particularly serious crime bar, Congress then restricted which aggravated felonies would automatically constitute a "particularly serious crime" for the purpose of barring a non-citizen from withholding of removal, adding a five year imprisonment requirement.[70] Congress used IIRIRA to limit *per se* particularly serious crimes in the withholding context to a final conviction of "an aggravated felony, or felonies, for which the [non-citizen] has been sentenced to an aggregate term of imprisonment of at least 5 years."[71] The purpose of this re-classification was again to prevent violations of the U.N. Protocol Relating to the Status of Refugees, as the *per se* rule for particularly serious crimes had

68. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.

69. *Id.* § 321(a).

70. *Id.* § 305(a) (amending former § 241(b) of the Immigration Act of 1990).

71. *Id.* IIRIRA also added that "the previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of the sentence imposed, an alien has been convicted of a particularly serious crime." *Id.*; *see also* Matter of N-A-M-, 24 I. & N. Dec. 336, 337–41 (B.I.A. 2007) (holding that a particularly serious crime "need not be an aggravated felony," before examining the consistent practice of the BIA and suggesting that "not all very serious offenses will meet all of the technical requirements that go along with classification as an aggravated felony under the INA," and that there may be offenses which fall outside of the enumerated aggravated felonies in § 101(a)(43) of the Immigration Act of 1990, but are still particularly serious crimes). At the time, there was a circuit split on whether a crime needed to be an aggravated felony in order to qualify as a particularly serious crime. *See* Alaka v. Att'y Gen. of the United States, 456 F.3d 88 (3d Cir. 2006) (holding that a crime must be an aggravated felony to come within the ambit of particularly serious). *But see* Delgado v Holder, 648 F.3d 1095 (9th Cir. 2011) (holding that the phrase "particularly serious crime" includes, but is not limited to, felonies). The 3rd Circuit later reversed its decision and adopted the more expansive "particularly serious crime" definition. *See* Bastardo-Vale v. Att'y Gen. United States, 934 F.3d 255 (3d. Cir. 2019) (holding that particularly serious crimes are not limited to only aggravated felonies and overruling *Alaka*). This Note does not suggest that this statute, as written, requires particularly serious crimes to be limited to only aggravated felonies, rather that the statute, as written, is unconstitutionally vague because it contains no limiting provision, such as this.

created tension with the Protocol by sweeping in some "fairly minor offenses."[72] However, IIRIRA also resulted in the addition of the residual clauses as they exist today to both the withholding and asylum statutes.[73] This addition was likely enacted to maintain the discretionary authority and flexibility of the Attorney General in considering compliance with the U.N. Protocol, as no ulterior motives were expressed, and it was this concern that informed the previous changes made in AEDPA, and the changes made concurrently in IIRIRA.[74]

Thus, following AEDPA and IIRIRA, the particularly serious crime bar in the withholding context (outside of the residual clause) is statutorily limited to aggravated felonies with an aggregate sentence of five years or more.[75] The only caveats—the portions that this Note argues are unconstitutionally vague—are the respective residual clauses enacted with IIRIRA, as they have been construed expansively by the BIA, seemingly against congressional intent.

The residual clause of the particularly serious crime bar as it pertains to the withholding statute still allows the Attorney General to determine, notwithstanding the length of the sentence imposed, that a non-citizen has been convicted of a particularly serious crime on a case-by-case basis.[76] The Attorney General delegates this

72. Matter of Q-T-M-T-, 21 I. & N. Dec. 639, 648 & n.4 (B.I.A. 1996) (quoting the Immigration Control and Financial Responsibility Act of 1996: Mark-up on S. 1664 before the S. Comm. On the Judiciary, 104th Cong. 2d sess. 60-61 (1996) (remarks of Sen. Kennedy)); *see also* Choeum v. INS, 129 F.3d 29, 42–44 (1st Cir. 1997) (crediting the argument put forth by INS that the amendments to the particularly serious crime bar in IIRIRA were motivated by the expansion of the aggravated felonies list).

73. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 305(a) (amending former § 241(b) of the Immigration Act of 1990) (adding that for withholding "the previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of the sentence imposed, an alien has been convicted of a particularly serious crime"); 8 U.S.C. § 1158 (1996); 8 U.S.C. § 1158 (1994) (showing the asylum statute before the addition of "by regulation" and the related power given to the Attorney General).

74. *See supra* notes 65, 72 and accompanying text.

75. The particularly serious crime bar in the asylum context, outside of the residual clause, is statutorily limited to aggravated felonies. 8 U.S.C. § 1158 (1996).

76. *See supra* note 26. The residual clause of the particularly serious crime bar as it relates to the asylum statute allows the Attorney General to establish additional ineligibility by regulation, which in practice has meant on a case-by-case basis. In *Bastardo-Vale*, the Ninth Circuit determined that the term

determinative power to Immigration Judges.[77] Thus, all Immigration Judges are empowered to determine whether individual crimes are particularly serious in each case that comes before them. It is these residual clauses that are unconstitutionally vague and thus ought to be invalidated under the void for vagueness doctrine.

2. Adjudicatory Evolution of the Particularly Serious Crime Bar Post-IIRIRA

While statutory revision ceased in 1996, judicial revision came again to the particularly serious crime bar in 2002, with *Matter of Y-L-*.[78] There, the Attorney General exercised their authority under the Immigration and Nationality Act (INA) and held that aggravated felonies which involved unlawful trafficking in controlled substances presumptively constituted particularly serious crimes.[79] This decision

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"particularly serious crime" and surrounding language must have the same meaning in both the asylum and withholding statutes. Bastardo-Vale v. Att'y Gen. United States, 934 F.3d 255 (3d. Cir. 2019). This allowed any crime to be determined particularly serious, such that this determination was not limited to aggravated felonies. This was the primary reason that the Ninth Circuit chose to overrule *Alaka*, where they had held that "particularly serious crime" was limited to aggravated felonies for withholding of removal purposes. *Id.* at 265 (quoting Smith v. City of Jackson, Miss., 544 U.S. 228, 410 (2005)) (stating that "[w]hen Congress uses the same language in two statutes having similar purposes . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes"). The decision in *Bastardo-Vale* supposes that the withholding of removal and asylum statutes have the same purpose, while in actuality one is a discretionary form of relief and the other is not. Reading "by regulation" to mean "case-by-case analysis" as these courts have done is pertinent to the vagueness challenge within this Article, as the current "case-by-case analysis" under the asylum statute holds the same vagueness concerns as withholding of removal, while a strict "by regulation" of the Attorney General would not. *Id.* at 272–74 (McKee, J., dissenting) (analyzing the difference between asylum and withholding of removal and the meaning of "by regulation" compared to the case-by-case analysis). While this reading of asylum and withholding of removal as serving the same purpose seems inherently incorrect, this Note will not further explore this issue.

77. *See* 8 C.F.R. § 1003.10(a) (2019) (stating that "immigration judges are attorneys whom the Attorney General appoints as administrative judges . . . . Immigration judges shall act as the Attorney General's delegates in the cases that come before them").

78. Matter of Y-L-, 23 I. & N. Dec. 270 (Op. Att'y Gen. 2002).

79. *Id.*

emphasized that only extraordinary and compelling extenuating circumstances would allow departure from such presumption.[80]

The most recent revision to the application of the particularly serious crime bar comes from the BIA case *Matter of N-A-M-* in 2007.[81] In *N-A-M-,* the BIA again revised the approach to the *Frentescu* factor test. The BIA held that if the elements of an offense "do not potentially bring the crime into a category of particularly serious crimes, the individual facts and circumstances of the offense are of no consequence," and the non-citizen would thus "not be barred from a grant of withholding of removal."[82] This decision created the additional step for immigration judges of determining whether the elements of a crime bring it "within the ambit" of particularly serious, before proceeding to the *Frentescu* factor test and examining the actual circumstances of the conviction.[83]

The court went on to state that "once the elements of the offense are examined and found to potentially bring the offense within the ambit of a particularly serious crime, all 'reliable information' may be considered in making a particularly serious crime determination," in accordance with the revised *Frentescu* factor test.[84] This "reliable information" can include conviction and

80. *Id.* at 274–76 (The Attorney General justified this presumption by noting the "long-standing congressional recognition that drug trafficking felonies justify the harshest of legal consequences"). The Attorney General stated that while concluding that all drug trafficking offenses are *per se* particularly serious crimes might be within his discretion, it was not necessary to entirely exclude the rare case where a non-citizen may be able to "demonstrate extraordinary and compelling circumstances that justify treating a particular drug trafficking offense as falling short of that standard." *Id.* The Attorney General then outlined a minimum standard that a non-citizen would need to satisfy, including: a very small quantity of controlled substance; a very modest amount of money paid; merely peripheral involvement by the non-citizen; the absence of violence or any threat of violence; the absence of any organized crime or terrorist organization involvement; and, the absence of any averse or harmful effect on juveniles. *Id.* at 276–77.

81. Matter of N-A-M-, 24 I. & N. Dec. 336 (B.I.A. 2007).

82. *N-A-M-*, 24 I. & N. Dec. at 342.

83. *Id.*

84. *See id.* at 342–43, for the revised *Frentescu* factor test (emphasizing that "the sentence imposed is not the most accurate or salient factor to consider in determining the seriousness of an offense" and reaffirming the rejection of future dangerousness while confirming that the factors to now be considered under the *Frentescu* factor test have been limited to: the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction); *see also* Matter of L-S-, 22 I. & N. Dec. 645, 651 (B.I.A. 1999) (considering the

sentencing records, as well as information outside the confines of a record of conviction.[85] That this "information *may* be considered" implies that it is not required to be considered, leading to *ad hoc* decisions about whether to base the determination of a crime's classification as particularly serious on the elements alone or on a combination of the facts and elements.[86]

A large number of crimes have at one time or another been classified as particularly serious, making it is difficult to identify which elements bring a crime "within the ambit" of particularly serious.[87] While the BIA stated in *Frentescu* that most particularly serious crimes would be those against persons, other crimes outside of this category have also been classified as particularly serious in certain cases. These include crimes against property, including financial crimes; crimes against the orderly pursuit of justice,

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conviction record and sentencing information); Matter of Carballe, 19 I. & N. Dec. 357, 360 (B.I.A. 1986) (rejecting that the *Frentescu* factor test requires a separate dangerousness analysis). However, in *Frentescu*, the court used the sentence imposed as the critical component in determining that the applicant was not a danger to the community and thus had not committed a particularly serious crime. Matter of Frentescu, 18 I. & N. Dec. 244, 247 (B.I.A. 1982) (considering the two now discounted factors as crucial).

85. *L-S-*, 22 I. & N. Dec. at 654–55; *see also N-A-M-*, 24 I. & N. Dec. at 344 (citing Matter of Babaisakov, 24 I. & N. Dec. 306 (B.I.A. 2007)) (stating that the BIA finds no reason to exclude "otherwise reliable information," once the nature of the crime brings it within the range of particularly serious).

86. *N-A-M-*, 24 I. & N. Dec. at 342 (emphasis added); *see also infra* Section II.C.2; Fatma Marouf, *A Particularly Serious Exception to the Categorical Approach*, 97 B.U. L. REV. 1427, 1453 (2017) (stating that allowing adjudicators leeway on "whether to apply an elements-based or facts-based approach" leads to results with "arbitrary, inconsistent, and unpredictable outcomes"). Additionally, when the BIA determines that a certain crime is *per se* particularly serious, immigration judges do not compare the elements of the statute of conviction to the generic federal offense. This means that a crime that is defined differently in different states, like burglary, and does not always meet the elements that the BIA has determined to be *per se* particularly serious, could still be deemed particularly serious. *Id.*

87. The BIA has found a wide range of crimes to be particularly serious, including a litany of crimes which require only recklessness or negligence. Marouf, *supra* note 86, at 1448–49. *See, e.g.*, Nethagani v. Mukasey, 532 F.3d 150, 152, 155 (2d Cir. 2008) (finding reckless endangerment to be particularly serious); *see also* Saqr v. Holder, 580 F.3d 414, 418 (6th Cir. 2009) (finding reckless homicide to be particularly serious); Delgado v. Holder, 648 F.3d 1095, 1107–08 (9th Cir. 2011) (reversing the BIA's original finding that a DUI offense was particularly serious, holding that the BIA's reasoning was insufficient and remanding for further consideration).

including tampering with evidence; and even some crimes with no direct injured party. [88] The BIA has found that certain crimes without a direct injured party are particularly serious not based on any specific facts, but rather due to the "totality of the impact" that they "inflict[] upon a community."[89]As the Eleventh Circuit states, the wishy-washiness and continual revision of the BIA's reasoning in these types of cases "reflects no analytical framework by which it can rationally distinguish crimes that are 'particularly serious' from those that are not" because "every petty crime, such as speeding, jaywalking, and loitering, has an impact on the community."[90]

The BIA's inability to specify which factors result in an offense being "within the ambit" of "particularly serious" causes even greater concern when combined with the BIA's "totality of impact" reasoning.[91] Not even intent can be used as a distinguishing factor for what makes a crime particularly serious: the BIA has stated that "evil intent" or fraud is relevant but "not necessarily dispositive" to the particularly serious crime determination.[92] Thus, a large array of crimes, "violent and nonviolent, against people and against property,

88. Marouf, *supra* note 86, at 1449–50. *See* Kaplun v. U.S. Att'y Gen., 602 F.3d 260, 267–68 (3d Cir. 2010); s*ee also* Arbid v. Holder, 700 F.3d 379, 385 (9th Cir. 2012) (holding that the BIA's decision that a scheme to defraud victims qualified as particularly serious was not an abuse of discretion); Denis v. U.S. Att'y Gen., 633 F.3d 201, 216 (3d. Cir. 2011) (holding that tampering with evidence was a particularly serious crime due to the crime's "gruesome brutality"); Alphonsus v. Holder, 705 F.3d 1031, 1035–36 (9th Cir. 2013) (finding that Respondent's conviction was particularly serious for resisting arrest); Yuan v. U.S. Att'y Gen, 487 F. App'x 511, 514 (11th Cir. 2012) (remanding a decision by the Immigration Judge who held that prostitution was a particularly serious crime, and stating that "the BIA reached [its] conclusion without examining the elements of the offense, the circumstances of the conviction, or the type of sentence imposed").

89. *Yuan*, 487 F. App'x at 514 (quoting the decision of the BIA and vacating it).

90. *Id.*

91. *Id.*; *see also* Marouf, *supra* note 86, at 1450–51 (discussing how some victimless crimes have been classified as particularly serious based on their "totality of impact" on the community).

92. Matter of G-G-S-, 26 I. & N. Dec. 339, 347 (B.I.A. 2014) (citing Section 241(b)(3)(B)(ii) of the *Act*); *see also Alphonsus*, 705 F.3d at 1048 (finding a crime particularly serious when there was "no finding of intent"); Matter of L-S-, 22 I. & N. Dec. 645, 655–56 (B.I.A. 1999) (finding no intent to cause harm and no harm caused). Additionally, the BIA has found crimes with the requisite mental state of only recklessness or negligence, as opposed to willfulness, to be particularly serious. Marouf, *supra* note 86, at 1448–1449.

with and without evil intent," can be considered "within the ambit" of particularly serious.[93]

The combination of the uncertain "within the ambit" determination and the second step of applying the indeterminate *Frentescu* factor test results in more vagueness than the Constitution allows, especially considering the harsh penalties and widely varying outcomes when vagueness is present in the immigration context.[94]

B. The Void for Vagueness Doctrine and Immigration Law

1. The Evolution of the Void for Vagueness Doctrine

In order for a statute to be unconstitutionally vague, it must be found to not satisfy at least one of the two independent bases under the vagueness doctrine. The doctrine encompasses two prongs, which require that statutes are defined so that "ordinary people can understand what conduct is prohibited" and "in a manner that does not encourage arbitrary and discriminatory enforcement."[95] The fair notice prong requires that people receive adequate notice of what is legally prohibited.[96] The arbitrary or discriminatory enforcement prong requires that the law provide sufficient standards for the assessment of conduct.[97] Under the contemporary vagueness doctrine, a statute can be found unconstitutionally vague if it violates either one of the prongs; it does not need to violate both.[98] The vagueness

93. Marouf, *supra* note 86, at 1451.

94. Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 L. & SOC'Y. REV. 117, 133–44 (2016) (examining decisions by immigration judges in immigration bond hearings and suggesting wide variations in outcomes across these judges).

95. Kolender v. Lawson, 461 U.S. 352, 357 (1983) (defining the requirements of the void for vagueness doctrine).

96. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (finding an ordinance void for vagueness because it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute").

97. *See, e.g.*, Johnson v. United States, 576 U.S. 591, 595 (2015) (citing *Kolender*, 461 U.S. at 357–58) (stating that the Government violates Due Process by "taking away someone's life, liberty, or property" under a law "so standardless that it invites arbitrary enforcement").

98. *See* Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 288–90 (2003). The arbitrary or discriminatory enforcement prong considers the possibility of both arbitrary or discriminatory enforcement as either being a valid reason to find a statute void-for-vagueness, and considers arbitrary and discriminatory as basically

doctrine applies to criminal statutes and select civil statutes where the severity of penalties or consequences is considered great.[99]

The Supreme Court has considered the application of the fair notice prong of the vagueness doctrine repeatedly.[100] The fair notice prong—"perhaps the most basic of due process's customary protections"—traditionally demands "precise and sufficient certainty" about the charges involved.[101] Since "many of the constitution's other provisions presuppose and depend on the existence of reasonably clear laws," unless an offense is "set forth with clearness and certainty," an indictment risks being held void in court.[102]

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interchangeable terms. *See, e.g.*, Nova Records, Inc. v. Sendak, 706 F.2d 782, 789 (7th Cir. 1983) (referring to the second prong as guarding against "the danger of arbitrary enforcement" and the risk that the statute "will be discriminatorily or arbitrarily enforced").

99. *See, e.g.*, Jordan v. De George, 341 U.S. 223, 231 (1951) (using the "grave nature of deportation" to apply the vagueness doctrine to an immigration removal statute); Fong Hwa Tan v. Phelan, 333 U.S. 6, 10 (1948) (stating that deportation is comparable to exile); Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 499 (1982) (applying a vagueness test that was "relatively strict" to an ordinance that "nominally impose[d] only civil penalties," because it was "quasi-criminal" due to "its prohibitory and stigmatizing effect"); Aptheker v. Sec'y of State, 378 U.S. 500, 516–17 (1964) (finding vagueness to be a fair analysis for a statute that "severely curtail[ed] personal liberty" by restricting "freedom of travel"); Minnesota *ex rel.* Pearson v. Prob. Ct. of Ramsey Cnty., 309 U.S. 270, 274 (1940) (applying the vagueness doctrine to a statute concerning civil commitment).

100. *See, e.g.*, *Jordan*, 341 U.S. at 230–31 ("The essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct."); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (stating that all persons should know what laws are being enforced against them); Kolender v. Lawson, 461 U.S. 352, 357 (1983) ("[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited.").

101. Sessions v. Dimaya, 138 S. Ct. 1204, 1225 (2018) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 301 (1769)).

102. *Id.* at 1225, 1227. *See, e.g.*, United States v. Harriss, 347 U.S. 612, 617 (1954) ("The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden."); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("[T]he terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." (quoting Connally v. General Construction Co., 269 U.S. 385, 391 (1926))); Cline v. Frank Dairy Co., 274 U.S. 445, 458 (1927) ("[The Fourteenth Amendment] certainly imposes upon a State an obligation to frame its criminal statutes so that those to whom they are addressed may know what standard of conduct is intended to be required."); Connally v. General

The arbitrary or discriminatory enforcement prong addresses the danger that would exist "if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large."[103] This arbitrary or discriminatory prong of the doctrine, as discussed and implemented by the Supreme Court, focuses on instances where Congress has failed to provide sufficient standards for statutory application, and has therefore delegated its duty to other branches.[104] The Supreme Court first adopted this prong as an independent basis for vagueness in 1972 with *Papachristou*.[105] In *Papachristou*, the court struck down a vagrancy statute under which a police officer could find any person guilty, at any time, when on a public sidewalk, of at least some behavior described in the statute.[106]

The vagueness doctrine permits the Supreme Court to strike down legislation that violates due process because it is "so standardless that it invites arbitrary enforcement,"[107] or, "so

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Construction Co., 269 U.S. 385, 391 (1926) ("[T]he terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties."); United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921) (finding unconstitutional a law which defined criminal conduct in a vague, indefinite, and uncertain manner).

103. Papachristou v. City of Jacksonville, 405 U.S. 156, 165 (1972) (quoting United States v. Reese 92 U.S. 214, 221 (1875)). This would "to some extent, substitute the judicial for the legislative," bringing up the concern of separation of powers. *Reese*, 92 U.S. at 221; *see also* Kolender v. Lawson, 461 U.S. 352, 358 (1983) (stating that the legislature is required to establish "minimal guidelines" to prevent a "standardless sweep").

104. *Papachristou*, 405 U.S. at 170 (stating that the law at issue provided a convenient tool for harsh and discriminatory enforcement by local prosecuting officials); *see also Kolender* 461 U.S. at 357–58 (stating that the arbitrary prong is "the more important aspect of the vagueness doctrine" and is designed to require, at minimum, having guidelines to govern law enforcement, not being too vague, having too few standards, or having insufficient standards).

105. *See Papachristou*, 405 U.S. at 170.

106. *See id.* (finding issue with the "unfettered discretion" given to the police, wherein "the poor and the unpopular are permitted to stand on a public sidewalk . . . only at the whim of any police officer").

107. Johnson v. United States, 576 U.S. 591, 595 (2015) (citing Kolender v. Lawson, 461 U.S. 352, 357–58 (1983)).

standardless that it authorizes or encourages seriously discriminatory enforcement."[108]

It does not require actual evidence of arbitrary or discriminatory enforcement, although that can be helpful.[109] The inquiry is "not whether discriminatory enforcement occurred [in a specific factual situation], but whether [a] Rule is so imprecise that discriminatory enforcement is a real possibility." [110]

2. Lack of Notice, Discrimination, and Arbitrariness in Immigration Law

The void for vagueness doctrine has been considered widely applicable to immigration law since *Jordan v. De George* in 1951,[111] which concerned the vagueness of the "crimes involving moral turpitude" provision of Section 19(a) of the Immigration Act of 1917.[112] In *Jordan*, although the Court upheld the statute at issue, it reaffirmed the use of the vagueness doctrine in the immigration context as the statute served to "apprise [non-citizens] of the consequences which follow after conviction and sentence," despite the

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108. FCC v. Fox TV Stations, Inc., 567 U.S. 239, 253 (2012) (citing United States v. Williams, 553 U.S. 285, 304 (2008)).

109. *See* League of Women Voters of Fla., Inc. v. Lee, 595 F. Supp. 3d 1042, 1132 (N.D. Fla. 2022) (explicitly disregarding a need for a showing of actual arbitrary enforcement if an ordinary reading of a statute can conceivably permit arbitrary or discriminatory enforcement).

110. Gentile v. State Bar of Nev., 501 U.S. 1030, 1049 (1991); *see also Kolender*, 461 U.S. at 357–58 (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)) (stating that if sufficient guidelines for enforcement are not provided, statutes may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections").

111. Jordan v. De George, 341 U.S. 223 (1951).

112. Previous § 19(a) Immigration Act of 1917, 39 Stat. 889, as amended, 8 U.S.C. § 155(a), 8 U.S.C.A. § 155(a) ("[A]ny alien who . . . is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, . . . shall, upon the warrant of the Attorney general, be taken into custody and deported.") [hereinafter, Previous § 19(a) Immigration Act of 1917]; *see, e.g.*, Boutillier v. Immigr. & Naturalization Serv., 387 U.S. 118, 123 (1967) (showing that the void for vagueness doctrine is applicable to civil as well as criminal action where a person is stripped of rights, like in the immigration context); Papachristou v. City of Jacksonville, 405 U.S. 156, 165 (1972) (acknowledging that the arbitrary or discriminatory enforcement prong is now a part of the vagueness doctrine); Sessions v. Dimaya, 138 S. Ct. 1204, 1223 (2018) (applying the vagueness doctrine in the immigration context and finding the portion of the statute that was at issue to be vague).

fact that it did "not declare certain conduct to be criminal." [113] The Court justified this application to immigration, stating that "deportation is a drastic measure and at times the equivalent of banishment or exile."[114]

The vagueness doctrine was most recently employed by the Supreme Court in the immigration context in *Sessions v. Dimaya* in 2018.[115] *Dimaya* relied on *Johnson v. United States* and concerned the application of the vagueness doctrine in immigration law, a civil context, as opposed to the doctrine's more characteristic application in a purely criminal context.[116] The Court's recent application of the vagueness doctrine in *Dimaya* has been relied on by two circuit courts in their consideration of the particularly serious crime bar, and is relevant to the vagueness doctrine's applicability in this context.[117] *Dimaya* shows that, presently, either prong of the vagueness doctrine is a valid avenue for a finding of unconstitutional vagueness in the immigration context. [118] In order to confront the flawed reasoning of

113. Previous § 19(a) Immigration Act of 1917; *see also* Jordan v. De George, 341 U.S. 223, 230 (1951) (expanding the application of the vagueness doctrine to immigration law but ultimately finding that the vagueness doctrine had not been met and determining that the statute was not unconstitutionally vague). The Court conducted this inquiry due to the "grave nature of deportation," despite the fact that the question of vagueness was not raised by the parties, since it had "been suggested that the phrase 'crime involving moral turpitude' lack[ed] sufficiently definite standards." *Id.* at 229, 231.

114. *Id.* at 231 (quoting Fong Hwa Tan v. Phelan, 333 U.S. 6, 9–10 (1948)) ("[Deportation] is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty.").

115. *See* Sessions v. Dimaya, 138 S. Ct. 1204 (2018) (applying the vagueness doctrine in the immigration context).

116. *Id.* at 1212–13.

117. *See id.* (relying on Johnson v. United States, 576 U.S. 591, 597 (2015); *see also* Guerrero v. Whitaker, 908 F.3d 541, 545 (9th Cir. 2018) (reconsidering the vagueness of the particularly serious crime bar after the unmistakable core approach *Alphonsus* employed was invalidated by the Supreme Court, and ultimately finding that the particularly serious crime bar was not unconstitutionally vague); *see also* Alphonsus v. Holder, 705 F.3d 1031, 1039 (9th Cir. 2013) (refraining from citing *Dimaya* but considering the vagueness of the particularly serious crime bar and determining the bar was not vague under the unmistakable core approach); Mumad v. Garland, 11 F.4th 834 (8th Cir. 2021) (using the Court's vagueness analysis in *Johnson* and *Dimaya* and incorrectly insisting this was the only way a statute could be found unconstitutionally vague).

118. Only one relevant hurdle to the due process rights of non-citizens, and thus the vagueness doctrine which is housed therein, has appeared since the Court's application of these rights and this doctrine in *Dimaya*. *See* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959 (2020) (finding, in relevant part,

the decisions by the Eighth and Ninth Circuits, analyzed in Part II, that the particularly serious crime bar is not vague, it is important to understand the cases which both circuits relied on, *Johnson v. United States*, and *Sessions v. Dimaya*.[119]

a. *Johnson v. United States*

In 2010, the Supreme Court resolved *Johnson*, a case that examined the vagueness doctrine in relation to the residual clause of the Armed Career Criminal Act (ACCA), which included any felony that "involve[d] conduct that present[ed] a serious potential risk of physical injury to another."[120] Although *Johnson* did not implicate immigration concerns, it served as the precedential basis for the recent application of the vagueness doctrine in the immigration context under *Dimaya's* vagueness challenge.[121] *Johnson* reaffirmed that the vagueness doctrine permits the Court to strike down legislation that violates due process because it either: fails to inform "a person of ordinary intelligence of what is prohibited," or "is so standardless that it authorizes or encourages seriously discriminatory enforcement."[122]

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that Congress is entitled to set conditions for a non-citizen's lawful entry, and that non-citizens at the threshold of initial entry cannot claim greater due process rights than those rights proscribed statutorily by Congress). The question of whether the vagueness doctrine still applies to immigration law and to non-citizens may arise, since the protections of the Due Process Clause do not automatically apply based purely on physical presence inside the US. However, in the case of removal proceedings, we can be sure that the Due Process Clause protections and the vagueness doctrine still apply, as removal proceedings indicate that the non-citizen has established some kind of residency in the country and is not at the threshold of initial entry. *See id.* at 1963–64 (holding that "aliens who have established connections in this country have due process rights in removal proceedings," but that "an alien at the threshold of initial entry," in this case a respondent who had entered the country illegally and was apprehended just 25 yards from the border, could not claim any greater rights under the Due Process Clause than what Congress granted).

119. *Johnson*, 576 U.S. at 591; *Sessions v. Dimaya*, 138 S. Ct. at 1204.

120. *Johnson*, 576 U.S. at 593. Under the Armed Career Criminal Act, a defendant convicted of being a felon in possession of a firearm faces more severe punishment if he has three or more previous convictions for a "violent felony." *Id.*

121. *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1210 (2018) ("adhering to our analysis in *Johnson*").

122. Federal Communications Commission v. Fox Television Stations, Inc., 567 US 239, 253 (2012) (quoting United States v. Williams, 553 U.S. 285, 304 (2008)). Although some have indicated that this change in wording to "seriously

The Court in *Johnson* stated that it was convinced that "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges," and offered that two features of the residual clause there at issue conspired to make it unconstitutionally vague.[123] These two features were (1) the grave uncertainty regarding how to "measure the risk posed by a crime," and (2) the uncertainty about "how much risk it takes for a crime to qualify as a violent felony."[124] The Court determined that these features produced "more unpredictability and arbitrariness than the Due Process Clause tolerates."[125]

In *Johnson*, the Court also considered, and rejected, Justice Alito's dissent, which urged the Court to "save the residual clause from vagueness by interpreting it to refer to the risk posed by the particular conduct in which the defendant engaged."[126] The Court cited several reasons for not applying this case-by-case approach, one of which was the "utter impracticability of requiring the sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction."[127]

b. *Sessions v. Dimaya*

Dimaya is the Supreme Court's most recent vagueness doctrine case in the context of immigration law.[128] In this case, the Court examined the unconstitutional vagueness of the residual clause of the "crime of violence" statutory provision, 18 U.S.C. § 16(b), which

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discriminatory enforcement" has limited the arbitrary and discriminatory enforcement prong of the void for vagueness doctrine, the Court in *Dimaya* disproves this by again reverting to the doctrine guarding against "arbitrary or discriminatory law enforcement." *Dimaya*, 138 S. Ct. at 1212. *But see Williams*, 553 U.S. at 304 (using a "seriously discriminatory enforcement" standard); *cf.* Cristina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 255, 257 (2010) (suggesting that this limitation provides a new standard for the second prong and suggesting that this prong should be altogether eliminated).

123. Johnson v. United States, 576 U.S. 591, 597 (2015).

124. *Id.* at 597–98.

125. *Id.* at 598.

126. *Id.* at 604. As the majority points out, Alito is suggesting that the Court endorse a case-by-case fact-based approach. *Id*.

127. *Id.* at 605; *see also* Taylor v. United States, 495 U.S. 575, 629 (1990) (stating that an elaborate factfinding process would be impracticable and unfair).

128. Sessions v. Dimaya, 138 S. Ct. 1204 (2018).

stated that "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," is a crime of violence.[129] The Court stated that "a straightforward application of *Johnson* effectively resolved this case," and that the residual clause in question had "the same two features" as the Armed Career Criminal Act in *Johnson*, "combined in the same constitutionally problematic way."[130] The Court did not state that a "straightforward application" of *Johnson* was required to find a clause unconstitutionally vague, but it observed the great similarity between the residual clauses at issue in each case.[131] Crucially, the Court also dismissed the Government's contention that a more permissive form of the vagueness doctrine applied in *Dimaya*, since the removal of a non-citizen is a civil matter.[132] The Court cited *Jordan v. De George* to support the proposition that in removal cases the most exacting vagueness standard should apply.[133]

The Court in *Dimaya* insisted that a statute must "provide standards to govern the actions of police officers, prosecutors, juries, and judges," emphasizing that the vagueness doctrine guarantees fair notice and "guards against arbitrary or discriminatory law enforcement."[134] The Court emphasized the "utter impracticability" and the "associated inequities" of a fact-based approach, wherein the court would need to examine the facts and history behind every conviction and preceding offense.[135] The Court specifically disagreed with the proposition put forth in Justice Thomas's dissent that the impracticability of a fact-based approach need not be a concern in the immigration context.[136] The Court stated that it "cannot see putting

129. 18 U.S.C. § 16(b); *see also Dimaya*, 138 S. Ct. at 1207.

130. *Dimaya*, 138 S. Ct. at 1207.

131. *Id.* at 1213.

132. *Id.* at 1213.

133. *Id.* at 1209, 1213 (citing Jordan v De George, 341 U.S. 223, 229 (1951)) (stating that "nothing in the ensuing years calls that reasoning into question").

134. Sessions v. Dimaya, 138 S. Ct. 1204, 1212 (2018) (quoting Kolender v. Lawson, 461 U.S. 352, 357–58 (1983)).

135. *Id.* at 1218 (concluding that the utter impracticability and associated inequities of this reconstruction is "as great" here as in *Johnson*); *see also* Johnson v. United States, 576 U.S. 591, 605 (2015) (saying "for example, if the original conviction rested on a guilty plea, no record of the underlying facts may be available"); Taylor v. United States, 495 U.S. 575, 600–02 (1990) (stating that the practical difficulties and potential unfairness of a factual approach are daunting).

136. *Dimaya*, 138 S. Ct. at 1218.

so much weight on the superior factfinding prowess of (notoriously overburdened) immigration judges," sarcastically replying to Justice Thomas's suggestion that immigration judges have some special factfinding talent or experience.[137] Nevertheless, in the context of the particularly serious crime bar, the Eighth and Ninth Circuits have condoned the type of fact-based approach advocated for in Justice Thomas's dissent.

3. Consequences of Vague Laws in the Immigration Context

The Supreme Court, in *Papachristou*, expressed wariness surrounding the impact that an overly vague statute could have on minorities and other socially vulnerable groups, those who may not be expected to have been "alerted to the regulatory scheme" of the law.[138] This is especially true with specific and difficult-to-discern segments of the law like the particularly serious crime bar. Non-citizens are often both members of a minority population and especially socially vulnerable.[139] Vague immigration laws similarly furnish "a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure,'" [140] and should thus be treated with extreme wariness.

Vagueness issues in immigration law carry special weight and have especially impactful consequences, as non-citizens face

137. *Id.*

138. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 162–63 (1972) (referring to the vagrancy law there at issue and stating that the Court "would assume [that the average person] would have no understanding of their meaning and impact if they read them"). This statement, while condescending, is clearly true here for everyone, not only for non-citizens, as the term "particularly serious" has no definition and a confused analysis that is applied neither consistently nor objectively. *See infra* Section II.B.1.

139. *See* Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127, 1138 (2016) (describing how the social marginalization of the regulated group in *Papachristou* led the court to invoke a stronger version of the vagueness doctrine).

140. *Papachristou*, 405 U.S. at 170 (citing Thornhill v. Alabama, 310 U.S. 88, 97–98 (1940)); *see also* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 301–02 (2007) (showing that discretionary asylum decisions made by immigration judges and the BIA are incredibly arbitrary); *Id.* at 378 (Showing how the different backgrounds of immigration judges can affect the outcome cases).

heightened issues of notice and arbitrariness.[141] When the law is vague, as with the particularly serious crime provision, the effects of the law can differ based on the officer who hears the case, or by case location.[142] Prosecutors, immigration judges, and the BIA are significantly affected by arbitrariness and inconsistency.[143] One of the

141. *See, e.g.*, Elise Foley, *Here's Why Atlanta is One of the Worst Places to be an Undocumented Immigrant*, HUFFINGTON POST (May 25, 2016), http://www.huffingtonpost.com/entry/deportation-raids-immigrationcourts_us_574378d9e4b0613b512b0f37 [https://perma.cc/J646-2E8S] (stating that Atlanta immigration judges have been accused of bullying children, badgering domestic violence victims, and setting standards for relief and asylum that lawyers say are next to impossible to meet).

142. *Id.* (showing that there are certain immigration courts, when compared to others, which have a reputation for denying a larger percentage of applications for relief by non-citizens). For example, the Atlanta Immigration Court's asylum denial rate sits at ninety-three percent, significantly higher than the fifty-two percent average for the rest of the country. *Id.*

143. The vagueness doctrine views with suspicion laws that fail to rein in the powers of law enforcement actors, including judges, who may potentially engage in arbitrary or discriminatory practices in the face of vague laws. *See Papachristou*, 405 U.S. at 170 (stating that the imprecise terms of the ordinance at issue furnish a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure"); *see also* Ramji-Nogales, *supra* note 140, at 301–02 (showing that discretionary asylum decisions by immigration judges and the BIA are incredibly arbitrary); *Id.* (showing that a significant number of Immigration Judges were first prosecutors, and a prosecutorial background has been shown to correlate with a smaller chance of an IJ granting a non-citizens' application for relief); Jason Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TULANE L. REV. 1, 20–24, 35 (2014) (showing that prosecutors on immigration cases sometimes aggressively litigate for removal in ways that do not align with the relevant legal standards or the goal of justice, when, in fact, ICE attorneys are supposed to act "as ministers of justice," or that they exercise their discretion inconsistently, and that "little constrains trial attorneys from proceeding with erroneous or overblown investigations"); U.S. DEP'T OF JUST., AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (July 28, 2008), http://www.justice.gov/oig/special/s0807/final.pdf [https://perma.cc/R45Q-QWP3] (showing that the political bias exhibited in the hiring of Immigration Judges under the George W. Bush administration has continuing effects on the current Immigration Judge bench); Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 L. & SOC'Y. REV. 117 (2016) (examining decisions by immigration judges in immigration bond hearings and showing the wide variations in outcomes across these judges); Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 290–91 (2003) (stating that "though the typical articulation of the arbitrary enforcement element of the vagueness analysis focuses on actions taken by law enforcement

concerns in *Dimaya* was that differing decisions about how to read the statute at issue changed the effects of the law depending on the jurisdiction where it was enforced, as it is nearly impossible to have fair notice of a law that had different meanings in different locations.[144] "How many (non-citizens) have been deported who would not have been had some other judge heard their cases, and vice versa, we may only guess. That is not government by law."[145] Immigration laws have a long history of racial discrimination, and while race-neutral on their face, recent immigration enforcement actions have seemingly targeted specific communities.[146] What's more, vague laws undermine the ability of defense attorneys at the criminal stage to negotiate favorable pleas for immigration clients.[147] *Padilla v.*

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authorities, in practice the Court has often considered the danger of arbitrary or discriminatory actions by judges and juries, as well").

144. As Justice Gorsuch in his concurring opinion in *Dimaya* states, "vague laws . . . can invite the exercise of arbitrary power . . . by leaving people in the dark about what the law demands and allowing prosecutors and courts to make it up." 138 S. Ct. at 1223–24. This failure to "describe with sufficient particularity what a suspect must do in order to satisfy the statute" leaves "judges to their intuitions and the people to their fate." *Dimaya*, 138 S. Ct. at 1224. *Kolender*, 461 U.S. at 361. In Justice Gorsuch's opinion, "the Constitution demands more." *Dimaya*, 138 S. Ct. at 1224. *See* Katherine Brosamle, *Obscured Boundaries:* Dimaya's *Expansion of the Void-for-Vagueness Doctrine*, 52 LOY. L.A. L. REV. 187, 206 (2018) (emphasizing that without the use of the vagueness doctrine when a statute is unclear courts would make decisions about how to apply it that would "fundamentally change[] the effects of the law depending on the jurisdiction it was enforced in," and that it is nearly impossible to have fair notice when a law's meaning changes based on locale); *see also Dimaya*, 138 S. Ct. at 1222 (showing that circuit courts disagreed on the statute's application to specific crimes).

145. Jordan v. De George, 341 U.S. 223, 240 (1951).

146. *See, e.g.*, MAE NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2014) (showing that recent immigration enforcement actions have seemingly targeted Latino communities, with removed non-citizen numbers being markedly higher among Latinos as compared to other communities). From 2008 to 2012, Latino immigrants comprised 78 percent of all undocumented immigrants, but in 2012 more than 96 percent of all removed noncitizens were Latino. *Id.*; *see also* Andres Dae Keun Kwon, *Defending Criminal(ized) "Aliens" After Padilla: Toward a More Holistic Public Immigration Defense in the Era of Crimmigration*, 63 UCLA L. Rev. 1034, 1048 (2016) (citing John F. Simanski, *Immigration Enforcement Actions: 2013*, DEP'T OF HOMELAND SEC'Y, 6 (2014)), https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2013.pdf [https://perma.cc/6VMU-GCXY] (stating that non-citizens from Mexico, Guatemala, Honduras, and El Salvador accounted for 96 percent of all removals in 2012).

147. Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127, 1156 (2016) (stating that "[v]ague laws

Kentucky emphasized that "accurate legal advice for noncitizens accused of crimes has never been more important" in advance of the imposition of immigration sanctions.[148] These concerns are only exacerbated if it is unclear—even to defense attorneys—how the particularly serious crime bar will apply to a client's conviction.[149] As immigration adjudications provide no statutory right to government appointed council, this is an even greater concern, and the need for notice should be heightened.[150] The vagueness doctrine would thus serve as an employable constraint against these statutes with enormous consequences, requiring notice and equal application in a field of law where both are scarce.

II. The Vagueness of the Particularly Serious Crime Bar in Practice

The residual clauses of the particularly serious crime bar, as currently applied, should be found void for vagueness. Although two circuit courts have upheld the bar, a close analysis of EOIR decisions reveals that the bar is applied in an inconsistent and unclear manner.[151] The misapplication and vagueness of the particularly serious crime bar in practice, shown by the BIA's lack of helpful interpretation and the EOIR decisions is not saved by the circuit court decisions and their incorrect analysis.[152] Part II analyzes the

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undercut the ability of defense attorneys to negotiate favorable pleas for their clients, particularly because the imposition of immigration consequences may occur years later").

148. Padilla v. Kentucky, 559 U.S. 356, 364 (2010) (going on to state that deportation is an integral part, "sometimes the most important part," of the penalty imposed on non-citizens who plead guilty to specified crimes).

149. Koh, *supra* note 139, at 1156 (discussing how the concerns animating *Padilla* will go unaddressed if even criminal defenders do not have notice of how an immigration statute will apply).

150. *See* 8 U.S.C. § 1362 (2012) (stating that counsel is a privilege and that it must be "at no expense to the Government"); *see also* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statute*s, 71 VA. L. REV. 189, 207–08 (1985) (suggesting that it is "lawyer's notice" that is required in actuality by the vagueness doctrine). It is clear that even "lawyer's notice" is not provided here when we consider the FOIA decisions. *Infra* Section II.B.1. However, especially for provisions with consequences as harsh as deportation, the standard for notice should not be at this level. Koh, *supra* note 139.

151. Mumad v. Garland, 11 F.4th 834 (8th Cir. 2021); Guerrero v. Whitaker, 908 F.3d 541 (9th Cir. 2018); *see infra* note 161 and accompanying text.

152. The Supreme Court has recognized "eight ways to defend statutes against vagueness allegations." Andrew E. Goldsmith, *The Void-For-Vagueness*

decisions of the Eighth and Ninth Circuits and the lack of limiting construction by the BIA to illustrate that the vagueness doctrine was applied incorrectly to the particularly serious crime bar. It also dissects the EOIR decisions to show the prevalence of muddled interpretations of the particularly serious crime bar in practice. By looking at errors in legal reasoning in the circuit court decisions, and examining the bar in practice, it becomes clear that the particularly serious crime bar is unquestionably vague and thus, unconstitutional.

A. Administrative Impact

When evaluating a facial challenge to the overbreadth and vagueness of a law the court must consider the "availability of administrative review or guidelines" and consider "any limiting construction that a state, court, or enforcement agency has proffered."[153] While this may initially appear to afford deference, it can also be damning in cases where agency interpretation has made the standards set to be applied more vague.[154] This can be seen in the BIA's interpretation of the particularly serious crime bar, which requires an uncertain "within the ambit" determination followed by application of the indeterminate *Frentescu* factor test.[155] These measures, instituted by the BIA, have not provided sufficient

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Doctrine in the Supreme Court, Revisited, 30 AM. J. CRIM. L. 279, 294–303 (2003). These eight defenses are: (1) that judicial interpretation adequately narrows the statute; (2) that legislative history illuminates the meaning of the statute; (3) that specialized definitions illuminate the meaning of the statute; (4) that common understanding of language illuminates the meaning of the statute; (5) that context of prohibited conduct illuminates the meaning (6) that law enforcement agencies have given the statute adequate meaning; (7) that the statute requires scienter; (8) or that the statute is easy to apply in practice. *Id.*

153. Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494 & n.5 (1982). Kolender v. Lawson, 461 U.S. 352, 355 (1983) (citing *Village of Hoffman Estates*, 455 U.S. at 494).

154. In Justice Jackson's dissent in *Jordan*, he addresses the role that agency's play in legislative actions. Jordan v. De George, 341 U.S. 223, 242 (1951) (Jackson, J., dissenting). Jackson wrote that a "different question might be before us had Congress indicated that the determination by the BIA . . . be given weight usually attributed to administrative determinations." *Id.* Jackson found issue with the fact that the precedential decisions by the BIA have no official authority as guidance documents or otherwise. *Id.* Instead, the court in each case is "making its own independent analysis and conclusion," and "no weight was attached to the decision of that question by the Board." *Id.* The same is true in the particularly serious crime context.

155. *See supra* notes 47–52 and accompanying text.

standards for the particularly serious crime bar. Instead, the BIA's uncategorical case-by-case expansion of the bar has provided greater opportunity for uncertainty and improper application.

B. Particularly Serious Crime Vagueness Determination in Practice

The particularly serious crime standards are anything but objective, and their inability to even be applied consistently, as shown below, emphasizes that the particularly serious crime bar is hopelessly indeterminate. As the statute at issue in *Dimaya* did, the particularly serious crime bar "asks so much of courts while offering them so little by way of guidance."[156] It requires courts to somehow first determine whether a crime is "within the ambit" of particularly serious, before examining whether it meets a certain arbitrary level of seriousness under the *Frentescu* factor test, while providing little guidance in the way of clarity or definitions. Since "failure of 'persistent efforts . . . to establish a legal standard' can provide evidence of vagueness," and repeated failures to "craft a principled and objective standard" can confirm a clause's "hopeless indeterminacy," it is clear that this presents a major concern.[157]

In practice, immigration judges "tend to almost always look at the underlying facts and circumstances before making a determination" of whether an offense comes "within the ambit" of particularly serious, thus departing from the procedure set forth in *N-A-M-*.[158] For example, in *Arbid v. Holder*, a Ninth Circuit case, the court upheld a decision where an immigration judge skipped over the "within the ambit" determination.[159] The immigration judge "began his analysis with a review of the Frentescu factors,"[160] despite the BIA's guidance that only "once the elements of the offense are examined and found to potentially bring [it] within the ambit" of particularly serious is the *Frentescu* factor test supposed to be

156. *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1231 (2018) (Gorsuch, J., concurring) (applying this statement to the statute at issue in *Dimaya*).

157. Johnson v. United States, 576 U.S. 591, 598 (2015) (citing United States v. L. Cohen Grocery Co., 255 U.S. 81, 91 (1921)).

158. Marouf, *supra* note 86, at 1451 (positing that the expansive interpretation of "within the ambit" leads to this practice).

159. *See id.* (quoting Arbid v. Holder, 700 F.3d 379, 385 (9th Cir. 2012) (stating that "[t]he [immigration judge] began his analysis with a review of the *Frentescu* factors")).

160. *Id.*

applied.[161] A review of the decisions produced as a result of the FOIA request also demonstrates the prevalence of the misapplication of the BIA's "within the ambit" analysis described in *N-A-M* and exemplified in *Arbid*. These decisions, though limited, provide further support for the proposition that the agency's interpretation and procedure only exacerbate the vagueness issues at play in the particularly serious crime bar.

1. Vagueness in the Freedom of Information Act Decisions

Twenty-three of the forty cases released from the EOIR via the FOIA request employed a discretionary particularly serious crime bar analysis.[162] A close reading of these twenty-three decisions

161. *Id.*; *see also* Matter of N-A-M-, 24 I. & N. Dec. 336, 337, 342 (B.I.A. 2007) (stating that "[i]f the elements of the offense do not potentially bring the crime into a category of particularly serious crimes, the individual facts and circumstances of the offense are of no consequence").

162. These cases are on-file with the Columbia *Human Rights Law Review* and are available by request. Two telephone meetings with the Executive Office of Immigration Review (EOIR) were conducted in relation to the FOIA request for this note. During these meetings, certain information about the EOIR's record-keeping and storage system was disclosed by agents of the EOIR. Telephone Interview with Shelley M. O'Hara, Attorney Advisor (FOIA), Executive Office of Immigration Review, and a Judicial Law Clerk, Executive Office of Immigration Review (October 12, 2021). Under the storage system of the EOIR, the decisions of Immigration Judges are stored in long-term storage facilities around the Washington, DC area. *Id.* The IJ decisions, on the whole, are not scanned into any computerized system, despite the fact that these decisions are created electronically. *Id.* It was unclear to the author whether the EOIR receives the decisions electronically or whether they request to receive paper copies. For at least certain types of relief, such as withholding of removal, the decisions are not divided by criminal deportation cases and other deportation cases. *Id.* The EOIR tracks a limited amount of data, and this data does not include race, whether deportation proceedings are a product of criminal offenses, withholding of removal, or the particularly serious crime bar. *Id.* EOIR explained in the first meeting that the only information they would be able to provide would be the decisions from cases that had gone on to be appealed at the BIA. *Id.* The only Immigration Judge decisions that the EOIR stores electronically, and therefore could be relayed in response to the author's FOIA request, are those that preceded a case appealed to the BIA. *Id.* All BIA decisions are stored electronically, and, most times, the original IJ decisions for these cases are then scanned into the EOIR system. *Id.* This database of BIA decisions and related proceedings is searchable by key terms. *Id.* If a case has been heard by the BIA it can be assumed that it is generally more likely that the respondent is represented by counsel. Since, in turn, with representation it is more likely that an Immigration

reveals clear differences, not only in how the "within the ambit" determination and the *Frentescu* factor test were implemented, but in whether they were implemented at all. Even if both were implemented, some decisions applied the analyses in the incorrect order or improperly weighed certain considerations.

The BIA in *N-A-M-* stated that the first determination that must be made is whether the elements of a crime bring it "within the ambit" of particularly serious.[163] It is only then that the *Frentescu* factor test is able to be utilized, and only then that "all reliable information may be considered in making a particularly serious crime determination."[164] The vagueness of the standards utilized in the cases was evident, with only four of them fully and correctly applying the "within the ambit" determination, followed by the Frentescu factor test.[165] Four of the cases received from the FOIA request contained no "within the ambit" consideration of the elements of the offense.[166] Five of these cases contained an inexact "within the ambit"

Judge would provide a reasoned opinion that addresses all issues appropriately, the data is likely skewed. Despite this, the concerns noted are clearly still at play. During the second meeting with the EOIR, the agents indicated that they were able to use the BIA database to find over 700 results using specified key terms, but that they were willing to send only forty of these decisions. Telephone Interview with Shelley M. O'Hara, Attorney Advisor (FOIA), Executive Office of Immigration Review and a Judicial Law Clerk, Executive Office of Immigration Review (Oct. 15, 2021). These key terms included "Matter of Frentescu" and "In re N-A-M-". These exact terms were chosen based on the frequency with which they were referred to specifically in cases (as opposed to In re Frentescu or Matter of N-A-M). EOIR proposed to limit these 700-some results by the 40 they found to be the most relevant. *Id.* The author asked if they would instead further limit the cases by the number of times the above terms occurred within the decisions, which they agreed to. *Id.* The hope was that this would allow for an examination of original immigration judge decisions where the factor test was applied, and allow for a determination of whether this application was incorrect or not fully completed.

163. Matter of N-A-M-, 24 I. & N. Dec. 336 (B.I.A. 2007).

164. *Id.*; *see also* Matter of L-S-, 22 I. & N. Dec. 645, 651 (B.I.A. 1999) (allowing the consideration of conviction records and sentencing information).

165. Case 2; Case 8; Case 9; Case 10. All identifying information was removed from cases, so they have been assigned numbers (in the format Case X) which are consistent throughout.

166. Case 12 (completing no "within the ambit" determination and declaring that one "fact alone is more than enough for this Court to determine that it is a particularly serious crime and should be a bar to withholding"); Case 14 (completing no "within the ambit" determination and using the underlying facts to reveal a victim's age, thus increasing the seriousness of the offense beyond that which would have been indicated by elements alone); Case 17 (considering no

determination based purely on either perceived general dangerousness or on the *Frentescu* factors, either of which is improper and out of order.[167] Additionally, one case determined an offense was particularly serious "based solely on its elements."[168] Another case completed no analysis at all.[169] One case completed a "within the ambit" determination following the application of the *Frentescu* factor test.[170] Four cases correctly applied the "within the ambit" determination, but followed it with an inadequate application of the *Frentescu* factor test, despite the fact that the offenses were not

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"within the ambit" determination but considering the factors of the *Frentescu* test expansively); Case 21 (completing no "within the ambit" determination but applying the *Frentescu* factor test and finding the offense to not be particularly serious despite the fact that it involved a "loaded weapon" and a "large amount of narcotics"). Many of these cases seem to show that the particularly serious crime determination is irrelevant, as withholding or asylum are declared to not be applicable to the non-citizens circumstances even without consideration of the bar. However, the bar is considered before eligibility for relief is, thus skewing the viewpoint immigration judges enter consideration of relief from and having unknown effects. Since bias has been shown to prevalently exist in immigration judge opinions, it is likely that this order of a positive particularly serious crime bar determination before the consideration of relief applicability has significant effects. *Supra* note 30.

167. Case 1; Case 3 (finding that "[t]he particulars of the respondent's conviction sufficiently support the finding that the respondent was convicted of a particularly serious crime" before considering whether the elements of the offense bring it "within the ambit" of particularly serious); Case 11 (applying only the *Frentescu* factors and skipping the "within the ambit" determination, but then stating that *Matter of Y-L-* applied instead); Case 15 (alluding to the elements of the offense not as a primary "within the ambit" determination, but as part of the analysis of seriousness along with type of sentence imposed and circumstances of the offense); Case 19 (mentioning a "within the ambit" determination as necessary, but only illustrating the factual basis for the plea and not addressing whether the specific elements bring it "within the ambit," and using the factors from the *Frentescu* factor test to "point to the dangerous potential" of the crime).

168. Case 4 (making the decision that an offense against a person was particularly serious based solely on its elements, since crimes against persons are *more likely* to be particularly serious, but not completing the required Frentescu factor test, a determination normally only done by the BIA and bringing in an ad hoc concern). *See supra* note 91 and accompanying text for a discussion of this concern.

169. Case 18 (providing no analysis, listing sentence length, and stating that "[i]n any event, the respondent's conviction for felony menacing under C.R.S. 18-3-206 constitutes a particularly serious crime).

170. Case 22.

found to be particularly serious based on their elements alone.[171] Four particularly serious crime determinations, those in Cases 7, 11, 20, and 23, found to be under *Matter of Y-L-*, and thus *per se* particularly serious, sometimes examined the possible applicability of extenuating circumstances, and sometimes did not, despite the fact that this examination is required.[172]

Even when the proper procedure was implemented fully and correctly, the procedure itself violates both the fair notice, and arbitrary or discriminatory enforcement prongs of the vagueness doctrine. The BIA's lack of framework, indicated above, allows any crime to be considered "within the ambit" of particularly serious, violating the notice prong of the vagueness doctrine. Additionally, the *Frentescu* factor test is highly subjective as it has no established standards, thereby violating the arbitrary enforcement prong of the vagueness doctrine. The cases which do follow the procedure are unbalanced in giving weight to different aspects of the offenses or convictions when considering them under the *Frentescu* factor test.[173]

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171. Case 5 (lumping all of the *Frentescu* factors into three sentences with no specific reference that it was applying the factor test); Case 6 (using the elements of the crime to determine that the defendant had taken property from a victim using force or fear since the respondent had taken a plea deal and no evidence was supplied to the court); Case 13 (completing a "within the ambit" determination, but not considering the particular facts or circumstances of the offense and determining that a one-year jail sentence "reflects the seriousness of this particular offense," despite the fact that it was not the maximum sentence for the offense); Case 16 (correctly examining the elements of the offense to bring it "within the ambit" but not having information underlying the facts and circumstances of the crime and only considering the length of the sentence and the elements of the offense).

172. Case 7 (not considering whether extenuating circumstances were present); Case 11 (seemingly confusing the Frentescu factor test as required under *Matter of Y-L-* and not clearly considering the extenuating circumstances illustrated in *Matter of Y-L-*); Case 20 (actually considering possible "extraordinary and compelling circumstances"); Case 23 (analyzing the specific extenuating circumstance that the court found to not be met under *Matter of Y-L-*). *See supra* notes 78–81 and accompanying text.

173. Case 2 (giving undue weight to sentence imposed); Case 3 (considering prior convictions as evidence substantiating dangerousness). Justice Reinhardt in his concurrence in *Delgado* stated that "[i]f an alien's *lack* of prior convictions is irrelevant to the 'particularly serious crime' determination, then as a logical matter, it must equally be irrelevant that an alien *does* have prior convictions," referencing (and quoting) the Attorney General's determination in Matter of Y-L- that "the fact that an alien has no prior convictions is irrelevant to the 'particularly serious crime' calculus." Delgado v. Holder, 648 F.3d 1095, 1113 (9th

This general lack of consistency bolsters the point that not only is the vagueness of these two tests significant on its own, but also that these tests are not being implemented correctly, creating an inability for parties to have fair notice of how the law will be applied and allowing the opportunity for discriminatory and arbitrary application. According to the Supreme Court, the most telling feature of vagueness is not division, but rather "pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider."[174] As the FOIA request decisions illustrate, the vagueness of the particularly serious crime bar is clear and shows this "pervasive disagreement" amongst immigration judges, despite decisions by the Eighth and Ninth Circuits concluding the particularly serious crime bar was not void for vagueness.[175]

C. Legal Challenges Concerning the Application of the Void for Vagueness Doctrine to the Particularly Serious Crime Bar

The Eighth Circuit and Ninth Circuit both recently held that the particularly serious crime bar was not unconstitutionally vague in the withholding of removal context.[176] However, the circuits' decisions rested on inconsistent reasoning, relied on faulty assumptions regarding congressional intent, and incorrectly extrapolated the Court's past application of the vagueness doctrine. The fatal combination at issue in both *Johnson* and *Dimaya* was (1) the combination of the indeterminacy about how to measure the risk posed by a crime and (2) the indeterminacy about how much risk it takes for the crime to qualify as a violent felony.[177] This combination of risk analysis is fairly new, and is not the only way that the

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Cir. 2011) (quoting *In re* Y-L-, 23 I. & N. Dec. 270, 277 (Op. Att'y Gen. 2002)). Case 6 (giving no weight to sentence imposed when no other evidence was available).

174. Johnson v. United States, 576 U.S. 591, 601 (2015).

175. *See infra* Section II.C.

176. Mumad v. Garland, 11 F.4th 834, 839–40 (8th Cir. 2021); Guerrero v. Whitaker, 908 F.3d 541, 544 (9th Cir. 2018). While this was in the withholding context, it can be assumed that these courts would likely extrapolate such findings to the asylum context based on the reasoning in *Bastardo-Vale*, which stated that in practice, the residual clauses are the same. *See supra* note 76 and accompanying text.

177. Sessions v. Dimaya, 138 S. Ct. 1204, 1208 (2018); *Johnson*, 576 U.S. at 598.

vagueness doctrine can be satisfied.[178] Yet in evaluating the particularly serious crime bar for vagueness, both the Eighth and Ninth Circuits, in *Guerrero v. Whitaker* and *Mumad v. Garland*, misread *Johnson* and *Dimaya* as holding that this combination was the only way that a statute could be held unconstitutionally vague.[179] The courts read *Johnson* and *Dimaya* as limiting the application of the vagueness doctrine and failed to analyze the two long-established prongs of the vagueness doctrine, notice, and arbitrary or discriminatory enforcement. However, neither *Johnson* nor *Dimaya* purported to change the prongs or limit their applicability.

1. Ninth Circuit

The Ninth Circuit evaluated the vagueness of the particularly serious crime bar two separate times, the first being with *Alphonsus v. Holder* in 2013, and the more recent being with *Guerrero v. Whitaker*, in 2018. On both occasions it held that despite the lack of clarity in the bar, the residual clause had some saving grace. The challenger in *Alphonsus v. Holder* contended that the particularly serious crime bar in the withholding of removal context, 8 U.S.C. § 1231(b)(3)(B)(ii), was unconstitutionally vague, as the statute provided no definition of what a "particularly serious crime was."[180] To combat this argument, the *Alphonsus* court used the reasoning of the now defunct unmistakable core approach, which required that "the challenger [] establish that no set of circumstances exists under which the [statute] would be valid."[181]

The court determined that the facial challenge in *Alphonsus* failed because there was an ascertainable group of circumstances, an unmistakable core, as to which the statute, as interpreted, provided an "imprecise but comprehensible standard . . . rather [than] . . . no standard . . . at all."[182] The court further stated that "there is, to be sure, 'doubt as to the adequacy of the particularly serious crime

178. *Johnson*, 576 U.S. at 598.

179. *Mumad*, 11 F.4th at 839. *Guerrero*, 908 F.3d at 545 (stating that "the fatal combination at issue in *Johnson* and *Dimaya* is absent here").

180. Alphonsus v. Holder, 705 F.3d 1031, 1041–42 (9th Cir. 2013).

181. *See id.* at 1043 (9th Cir. 2013) (applying the unmistakable core approach); United States v. Salerno, 481 U.S. 739, 745 (1987) (explaining the standards of the unmistakable core approach). *But see Johnson*, 576 U.S (overturning the unmistakable core approach).

182. *Alphonsus*, 705 F.3d at 1043 (quoting Vill. Of Hoffman Est. v. Flipside, 455 U.S. 489, 495 n. 7 (1982)).

standard in less obvious cases.'"[183] However, under the unmistakable core approach, the court found that it was unnecessary to further examine this doubt.

The vagueness doctrine evolved over time to dispose of the unmistakable core approach, which required that "a statute be vague in all of its applications" in order to be invalidated as a matter of due process.[184] However, Justice Scalia's majority opinion in *Johnson* rejected this approach.[185] The Court stated that its holdings "clearly contradict" the theory that a vague provision is constitutional "merely because there is some conduct that falls within the provision's grasp."[186] The Court reiterated its rejection of the unmistakable core approach in a footnote in *Dimaya*.[187] Thus, post-*Johnson*, the *Alphonsus* court's reasoning was no longer sound.

The Ninth Circuit next faced the question of unconstitutional vagueness concerning the particularly serious crime bar in *Guerrero* in 2018.[188] In this case, the court addressed only whether the statutory phrase "particularly serious crime" was unconstitutionally vague on its face in the withholding of removal statute.[189] The court in *Guerrero* stated that the "particularly serious crime" bar "requires the agency to place the [non-citizen's] conviction along a spectrum of seriousness."[190] The court looked to *Alphonsus* to state that the *per se* aggravated felony particularly serious crime category "suggest[s] the types of crimes most likely to be covered by the statute even when the aggregate sentence is less than five years."[191] In practice, it has been

183. *Id.* at 1043 (quoting Jordan v. De George, 341 U.S. 223, 232 (1951)).

184. Johnson v. United States, 576 U.S. 591, 603 (2015).

185. *Id.*

186. *Id.* at 602; *see also id.* at 596 (suggesting that facial review and invalidation is always appropriate under the vagueness doctrine).

187. Sessions v. Dimaya, 138 S. Ct. 1204, 1214 n.3 (2018) (stating that "*Johnson* made clear that our decisions squarely contradict the theory that a vague provision is constitutional purely because there is some conduct that clearly falls within the provision's grasp").

188. Guerrero v. Whitaker, 908 F.3d 541, 544 (9th Cir. 2018).

189. This re-evaluation was required as the Supreme Court's decisions in *Johnson* and *Dimaya* had invalidated the unmistakable core approach *Alphonsus* had relied on. *Id.* at 544 (first citing *Johnson*, 576 U.S. 591; then citing *Dimaya*, 138 S. Ct. at 1218).

190. *Guerrero*, 908 F.3d at 544.

191. *Id.* at 545 (citing Alphonsus v. Holder, 705 F.3d 1031, 1043 (9th Cir. 2013)).

shown that this is not the way the bar is, or is required to be, applied.[192]

The *Guerrero* court purported to "know with certainty that a minor traffic infraction is not particularly serious and that a heinous, violent crime is particularly serious."[193] However, the court emphasized that "for the crimes in between, the statute provides little guidance," and that it "provides an uncertain standard to be applied to a wide range of fact-specific scenarios."[194] Confusingly, the court then went on to say that this uncertainty and lack of guidance "does not mean that a statute is unconstitutionally vague."[195] The court cited *Johnson* to say that the problem there was not that the "terms were uncertain in isolation; the problem was that the uncertainty had to be applied to an idealized crime."[196]

The court contended that "[c]ritically, the 'particularly serious crime' inquiry in 8 U.S.C. § 1231(b)(3)(B)(ii) applies *only* to real-world facts."[197] Although the Court in *Johnson* implied that an inability to review the real-world facts was one problem in the vagueness analysis, reading *Johnson* to mean that the underlying facts of a conviction should be reviewed in order to avoid the vagueness problem misunderstands *Johnson* and the value of the categorical approach.[198] Instead, the Court in *Johnson* consistently emphasized

192. *Supra* Section II.B.1.

193. However, under the type of analysis that has been shown by the FOIA decisions to actually be completed, and the lack of intent as a necessary requirement, a "minor traffic infraction" could be determined to be a particularly serious crime. *See supra* Section II.B.1.

194. *Guerrero*, 908 F.3d at 545.

195. *Id.*

196. *Id.*; *see also* Johnson v. United States, 576 U.S. 591 (2015); Sessions v. Dimaya, 138 S. Ct. 1204, 1218 (2018) (both holding that the statute's reliance on an idealized crime standard contributed to them being voided for unconstitutional vagueness).

197. *Guerrero*, 908 F.3d at 545 (emphasis in original).

198. The categorical approach is an approach prevalent in immigration law where a state statute of conviction is compared to the elements required for a federal offense, and only qualifies as such a federal conviction if the state statute is not overbroad. *See Johnson*, 576 U.S. at 604 (indicating that the Court supports the application of the categorical approach in its strictest form, as it explicitly affirmed it, turning significantly, or perhaps exclusively, on statutory elements when comparing state statutes of conviction to federal statutes of conviction and limiting fact-finding). In *Johnson*, the relevant portion of the ACCA emphasized convictions, and the Court stated that this emphasis indicated that "Congress intended the sentencing court to look only to the fact that the defendant had been

the problems that can arise in a fact-based approach, and the plethora of reasons why such an approach was not used there.[199]

The "utter impracticability" of requiring a sentencing court to "reconstruct, long after the original conviction, the conduct underlying that conviction" has been driven home by the Supreme Court.[200] However, with little guidance, this is exactly what courts are asked to do with the conduct considered under the particularly serious crime analysis. The court in *Guerrero* misunderstood *Johnson* as holding that "while many statutes provide uncertain standards, so long as those standards are applied to real world facts, the statutes are almost always constitutional," and found that since the particularly serious crime provision applied to real-world facts, it was not unconstitutionally vague.[201] This reading of *Johnson* squarely contradicts vagueness doctrine cases like *Papachristou* and *Kolender v. Lawson*—concerning a loitering and wandering statute similar to that in *Papachristou*—which did not involve an abstract determination (like the ordinary case approach in *Johnson*) and were instead applied to real-world facts and found to be void for vagueness.[202]

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convicted of crimes falling within certain categories, and not to the facts underlying prior convictions" (emphasis added). *Id.* at 601–03 (quoting Taylor v. United States, 495 U.S. 575, 602 (1990)) (stating that emphasis on convictions, and that the ACCA "refers to 'a person who . . . has three previous convictions'—not a person who has committed—three previous . . . offenses"). Similarly, the particularly serious crime bar emphasizes that whether a non-citizen has "been *convicted* by a final judgement of a particularly serious crime" is what should be examined. 8 U.S.C. § 1158(b)(2)(A)(ii) (stating that a non-citizen is ineligible for asylum if they "have been *convicted* by a final judgement of a particularly serious crime") (emphasis added); *see also* 8 U.S.C. § 1158 (b)(2)(B)(i) (stating that a non-citizen "who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime").

199. *Johnson*, 576 U.S. at 605 (citing *Taylor*, 495 U.S. at 600–02 (stating that the "practical difficulties and potential unfairness of a factual approach are daunting," and asking about whether the Government would be permitted to introduce the trial transcript at court, whether witness testimony would be able to pe presented, whether the defense could bring witnesses of their own, and the lack of information that often results from a guilty plea; to name some of the difficulties).

200. *Id.* at 605 (stating that "[i]f the original conviction rested on a guilty plea, no record of the underlying facts may be available").

201. *Guerrero*, 908 F.3d at 545.

202. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 164–71 (1972) (looking to the particular facts of the situation when a vagrancy statute was examined); *see also* Kolender v. Lawson, 461 U.S. 352, 361 (1983) (looking to the

The court in *Guerrero* then used their fact-based reasoning to hold that "the 'particularly serious crime' provision is not unconstitutionally vague on its face," since the "fatal combination at issue in *Johnson* and *Dimaya* is absent here."[203] The *Guerrero* court spent the majority of its analysis on this "fatal combination" issue, comparing the particularly serious crime provision to the residual clause in *Johnson*. The court acted as if the "fatal combination" version of the vagueness doctrine as applied in *Johnson* was the only way that a statute could be found unconstitutionally vague.[204] The *Guerrero* court did not consider—as it should have—the two prongs of the vagueness doctrine or how they may apply to the particularly serious crime determination. Nor did the court explain how the statute's application to only real-world facts addressed the fair notice or arbitrary and discriminatory enforcement concerns of the vagueness doctrine.[205]

However, even if this "fatal combination" is how the vagueness doctrine should be applied to the particularly serious crime bar, the residual clauses of the bar ought to still be found void for vagueness. First, the elements that cause a crime to qualify as "within the ambit" of particularly serious are not defined. This creates uncertainty about how much risk it takes for a crime to qualify as particularly serious. This is similar to the second feature in *Johnson*, measuring "how much risk it takes for a crime to qualify as a violent felony."[206] Second, there has been no clear definition for determining what a particularly serious crime is by the BIA. Instead, all that is available is the inexact *Frentescu* factor test.[207] This creates indeterminacy about how to measure the seriousness of a crime and the future risk to the community posed by the crime. This is similar to the first feature in *Johnson*, how to "measure the risk posed by a crime."[208] Thus, the particularly serious crime bar combines the indeterminacy of how serious a crime must be for its elements to qualify as "within the ambit" of particularly serious, with the

particular facts of the situation when a loitering and wandering statute was examined).

203. *Guerrero*, 908 F.3d at 545.
204. *Id.*
205. *See id.*
206. *Johnson*, 576 U.S. at 598.
207. Matter of Frentescu, 18 I. & N. Dec. 244, 247 (B.I.A. 1982).
208. *Johnson*, 576 U.S. at 598.

indeterminacy of how serious the facts of the crime must be to qualify as particularly serious under the *Frentescu* factor test.

Importantly, *Guerrero* itself is an inherently flawed choice for analysis of the particularly serious crime bar's potential vagueness. The crime at issue in *Guerrero* was a drug trafficking offense, which is itself a separate category of particularly serious crime, closer to the *per se* aggravated felony bar that is statutorily mandated, as shown by *Matter of Y-L-*.[209] This *per se* classification for all but the narrowest exceptions ensures that the notice prong of the vagueness doctrine likely would have been met, had it actually been addressed by the court.[210] The clarity in the *Matter of Y-L-* exceptions also helps to combat arbitrary or discriminatory issues, while those same issues abound in the "within the ambit" determination and *Frentescu* factor test. Seemingly ignoring this lack of real analysis and flawed applicability, the Ninth Circuit has continued to apply *Guerrero* to future vagueness cases not within the near *per se* category of drug trafficking. *Guerrero* was also cited as influential in the Eighth Circuit's analysis of the vagueness of the particularly serious crime bar.[211]

2. Eighth Circuit

The Eighth Circuit considered an unconstitutional vagueness challenge to the particularly serious crime bar as a matter of first impression in *Mumad v. Garland* in 2021.[212] According to Mumad, the statutory term "particularly serious crime" in the withholding of removal context was void for vagueness because "it gives the executive and judicial branches free rein to label any conviction a [particularly serious crime]."[213] However, the court disagreed, stating that "a statute is not necessarily void for vagueness simply because it

209. Matter of Y-L-, 23 I. & N. Dec. 270, 276 (Op. Att'y Gen. 2002).

210. *See supra* notes 78–81 and accompanying text. The Attorney General's standards in *Matter of Y-L-* are especially important when it is understood that these criteria determine eligibility only for an exception from a published, fair notice default. They are much clearer and more exacting than those put forth in the *Frentescu* factor test—a test used to determine extraneous ineligibility that does not provide fair notice.

211. Mumad v. Garland, 11 F.4th 834, 837 (8th Cir. 2021).

212. *Id.* at 834.

213. *Id.* at 836.

may be ambiguous or open to two constructions."[214] The Eighth Circuit agreed with the conclusion of the Ninth Circuit in *Guerrero*, but noted that they took "a somewhat different route to get there."[215] The court determined that it was two textual limits and their dictionary definitions that saved the statute: the phrase "particularly serious," and the phrase "danger to the community of the United States."[216] The court determined that "the 'particularly serious' modifier places the '*non-per-se'* [particularly serious crime] in context," because it means the seriousness of the crime itself must be "excessive in quality or extent to some unusual degree."[217] This supposedly required determination is no clearer than the phrase "particularly serious" itself. Justice Jackson, considering seriousness as a qualifier in his dissent in *Jordan* when addressing the vagueness of CIMTs, stated that "we cannot see that seriousness affords any standard of guidance."[218]

The *Mumad* court also agreed with the Ninth Circuit that "danger to the community of the United States," modifies what comes before it, and thus "only a crime that makes the [non-citizen] a 'danger to the community' can count as a *'non-per-se'* [particularly serious crime]."[219] This seems similar to the previous separate determination of dangerousness that was required before the *Frentescu* factor test was revised in *Carballe*, and this component of the test was invalidated by the BIA. The BIA has, in practice, said

214. *Id.* at 838 (quoting Williams v. Brewer, 442 F.2d 657, 660 (8th Cir. 1971)).

215. *Id.* at 839.

216. *Id.* at 840 (defining particularly serious as "excessive in quality or extent to some unusual degree" and interpreting "danger to the community of the United States" to modify what comes before it, thus allowing a crime to qualify as a particularly serious crime only when it "makes the alien a 'danger to the community'").

217. *Id.* at 840 (citing *Particularly*, Webster's Third New Int'l Dictionary 1647 (2002) ("[I]n a special or unusual degree to an extent greater than in other cases[.]"); *Serious*, Webster's Third New Int'l Dictionary 2073 (2002) ("Grave in . . . manner"); *Id.* ("[S]uch as to cause considerable distress, anxiety, or inconvenience: attended with danger."); *see also* DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGR. LAW & CRIMES § 9:17 (2021) (using dictionary definitions to reach the "inescapable" conclusion that a *non-per-se* PSC "must be 'serious to a distinctively or notably unusual degree'").

218. Jordan v. De George, 341 U.S. 223, 236 (1951) (Jackson, J., dissenting).

219. *Mumad*, 11 F.4th at 840 (citing Guerrero v. Whitaker, 908 F.3d 541, 544–45 (9th Cir. 2018)).

that impact on community is enough, on its own, to render a crime particularly serious, completely upending the Eighth Circuit's contention that "only a crime that makes the [non-citizen] a 'danger to the community'" can count as a '*non-per-se*' particularly serious crime.[220]

This relaxed "impact on community" standard from BIA precedent is contrary to the "excessive in quality or extent to some unusual degree" requirement that the Eighth Circuit says places the particularly serious crime determination in context.[221] The Eighth Circuit also forgoes any analysis of the two prongs of the vagueness doctrine, failing to explain how the prongs are satisfied under its analysis, and indeed mentions both the fair notice and arbitrary enforcement prongs only once, when explaining the vagueness doctrine and what it requires. [222]

Crucially, in *Mumad*, the Eighth Circuit did not follow Thomas's dissent in *Dimaya* or Alito's dissent in *Johnson*—which both argued that the fact-specific approach saved the statute—likely because the indeterminacy of the particularly serious crime bar procedure shows that it does not.[223]

D. Summary

Justice Gorsuch, in his concurrence in *Dimaya*, emphasized that "the adoption of new laws restricting liberty is supposed to be a hard business, the product of an open and public debate among a large and diverse number of elected representatives."[224] The

220. *See* Yuan v. AG, 487 F. App'x 511 (11th Cir. 2012). While this specific application was invalidated by the Eleventh Circuit in *Yuan*, it is evident, courtesy of the EOIR decisions, that the standards are routinely misapplied. This likely indicates that the practice is more common than this specific case, and it has not been addressed by any other circuits. *See also* Mumad, 11 F. 4th at 840.

221. *See Mumad*, 11 F. 4th at 840.

222. *See id.* at 837–40 (mentioning each prong only once in quotations when explaining what the analysis under the vagueness doctrine is supposed to be).

223. This would have been a simpler way for the court to invalidate the claim had it wished to do so, with the concurrence in part in *Mumad* saying that this "straightforward observation" would "all but resolve[]" the challenge. Mumad v. Garland, 11 F.4th 834, 842 (8th Cir. 2021) (Kelly, J., concurring in part). That the court did not apply this approach suggests that it was aware that it may not, in fact, save the statute.

224. Sessions v. Dimaya, 138 S. Ct. 1204, 1228 (2018) (Gorsuch, J., concurring).

classification of particularly serious crimes under the residual portions of the statutes has in no way met this standard. There has been no notice, no publication, and no standard—much less an opportunity for debate. There have only been decisions that have pulled the noose tighter and tighter, with the law suffocating unsuspecting applicants. The Attorney General in *In re Y-L-* criticized the BIA's case-by-case approach as "often haphazard" and leading to results "that are both inconsistent and … illogical."[225]

III. Solving the Vagueness of the Particularly Serious Crime Bar

In *Kolender*, the Supreme Court stated that "[a]lthough due process does not require impossible standards of clarity…this is not a case where further precision in the statutory language is either impossible or impractical."[226] So too is this true here, further clarity in the language of the particularly serious crime bar is certainly not impossible, as there is no definition of a particularly serious crime provided at all. To save the particularly serious crime bar from a finding of unconstitutional vagueness, Congress could enact legislative changes, the Attorney General could enact strict limitations as to what can constitute a particularly serious crime, or the BIA could revise and expand the factors it considers.

A. Satisfying Both the Notice and Arbitrary & Discriminatory Enforcement Prongs of the Vagueness Doctrine

1. Striking the Residual Clauses Down as Unconstitutional

Given the vagueness of the particularly serious crime bar, the question of how to resolve the lack of notice and the risk of arbitrary or discriminatory enforcement is a significant one. The residual clauses of the asylum and withholding of removal statutes could be struck down as unconstitutional, effectively limiting particularly serious crimes to aggravated felonies for asylum and aggravated felonies with an aggregate term of imprisonment of at least five years for withholding, and satisfying both the notice and arbitrary or discriminatory enforcement prongs of the vagueness doctrine. This

225. Y-L-, 23 I. & N. Dec. 270, 273 (Op. Att'y Gen. 2002).
226. Kolender v. Lawson, 461 U.S. 352, 361 (1983).

would be both the simplest and most expedient option. As evidenced in Part II, there is significant evidence that would make this approach viable. However, simply striking down the residual clauses would require a decision by the Supreme Court, and would continue to prohibit the consideration of mitigating factors.

B. Satisfying the Notice Prong of the Vagueness Doctrine

1. Creating an Exhaustive List

Congress or the Attorney General could draw the line and limit what counts as a particularly serious crime to violent offenses, if the residual portions of the current statutes is not found to be unconstitutionally vague and greater specificity or a revised standard is desired.[227] It would also be feasible to create a list which categorizes certain crimes as "within the ambit" of particularly serious, after which discretionary review applies. Determining a threshold for what qualifies as particularly serious may be a viable option. While this line could feasibly include any *per se* particularly serious crimes, the idea of limiting this list to violent offenses has some support.[228] This option would be less likely to confront the arbitrary or discriminatory enforcement prong of the vagueness doctrine, but would satisfy notice.

This idea garners support from Justice Reinhardt's attempt to distinguish what does and does not count as a particularly serious crime in his concurrence in *Delgado*.[229] He stated that "a list of crimes that the statutes make *per se* "particularly serious" (by virtue of their status as aggravated felonies) gives some indication of the types of offenses that stand apart in their seriousness."[230] Justice Reinhardt

227. *See* Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 612. (2011) (stating that the primary reason to have criminal laws is to address violent crime, as "we humans are physically vulnerable creatures and we expect law to provide a measure of protection").

228. *See* Delgado v. Holder, 648 F.3d 1095, 1109 (9th Cir. 2011) (discussing the original goal of the particularly serious crime bar); *see also* Mary Holper, *Redefining "Particularly Serious Crimes" in Refugee Law*, 69 Fla. L. Rev. 1093, 1139–43 (2017) (laying out the reasoning behind a distinction based on violence).

229. *See Delgado*, 648 F.3d at 1109 (Reinhardt, concurring) (examining the issues with labeling a DUI as particularly serious).

230. *See id.* at 1109 (Reinhardt, concurring) (listing "murder, rape, or sexual abuse of a minor, child pornography offenses, treason, the disclosure of

points to crimes that the Attorney General has determined to be *per se* particularly serious, regardless of the circumstances of the individual conviction, including: felony menacing, by threatening with a deadly weapon; armed robbery; and burglary of a dwelling, during which the offender is armed with a deadly weapon or causes injury to another.[231] These clear examples of violent crimes, and their designation as *per se* particularly serious from the Attorney General, show that violent crimes are more easily and clearly understood as particularly serious crimes.

By limiting the particularly serious crime bar to only violent crimes, the principle of proportionality and the notice concerns under the vagueness doctrine are more likely to be protected. The bar's motivation of protecting the community from true dangerousness would also still be satisfied. It is unlikely that the BIA would also consider mitigating factors under this approach, but, if so, this would bring the United States much further in line with its international obligation of non-refoulement.[232]

2. Establishing an Enumerated List of Crimes "Within the Ambit" of Particularly Serious

The *Frentescu* factor test, the second part of the BIA's particularly serious crime determination under the residual clauses, is unconstitutionally vague, as it allows for discriminatory or arbitrary enforcement, and creates significant notice problems. If the BIA insists that it will not change consideration of what constitutes a particularly serious crime from a case-by-case, fact-based approach, it should at least define what crimes fall "within the ambit" of particularly serious, even if this list is not limited to violent offenses. This would assist with uniformity, making clear what offenses the *Frentescu* factor test applies to and providing at least some notice to non-citizens as to what conduct would be likely to result in a particularly serious crime determination. This would also give non-citizens the ability to make educated decisions about what plea deals to consider and the impact pleas may have on an asylum or withholding of removal claims. While the arbitrary or discriminatory prong would not necessarily be satisfied—the *Frentescu* factor test

national defense information, or RICO offenses" as those offenses that give some indication of what offenses stand apart as particularly serious).

231. *Id.*

232. *See supra* notes 37–39 and accompanying text.

allows for a large amount of arbitrary and discriminatory decision making—having clearer standards of what crimes the *Frentescu* factor test applies to would assist both Immigration Judges and non-citizens.

C. Satisfying the Arbitrary and Discriminatory Enforcement Prong of the Vagueness Doctrine

1. Applying the Categorical Approach

If none of the options in Section III.B can be feasibly implemented, applying the categorical approach to the particularly serious crime bar, by considering only the specific elements of the offenses at issue as opposed to the specific facts, would be the best way to address the concern of arbitrary or discriminatory enforcement.[233]

The BIA, by taking the position that particularly serious crime assessments are "inherently discretionary," has decided that the categorical approach does not and should not apply.[234] However, the particularly serious crime bar is the only bar to relief based on a conviction that does not apply the categorical approach.[235] There are thus several reasons to question the BIA's proposition that the particularly serious crime assessment is "inherently discretionary."[236]

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233. *See supra* note 214 and accompanying text for an explanation of the categorical approach.

234. *See* Matter of Frentescu, 18 I. & N. Dec. 244 (B.I.A. 1982) ("A determination of whether a crime is a 'particularly serious crime' will depend upon the facts in each case."); Matter of N-A-M-, 24 I. & N. Dec. 336, 344–45 (B.I.A. 2007) (affirming the discretionary nature of particularly serious crime assessments).

235. *See* Marouf, *supra* note 86 at 1438.

236. The withholding of removal statute and the asylum statute, as they pertain to the particularly serious crime bar, use specific differing language. The withholding of removal statute uses the word "decides" and the asylum statute uses "determines." *See* 8 U.S.C. § 1231(b)(3)(B) (showing the language for withholding); *see also* 8 U.S.C. § 1158(b)(2)(A) (showing the language for asylum). There are a number of appeals courts which have held that these specific words in these statutory provisions do not specify that these decisions are discretionary. *See, e.g.*, Arbid v. Holder, 700 F.3d 379, 384 (9th Cir. 2012) (finding that the BIA has full discretion only when Congress has explicitly stated as much); Delgado v. Holder 648 F.3d 1095, 1100 (9th Cir. 2011) (stating a court may review BIA action when Congress has not explicitly barred the court from doing so); Nethagani v. Mukasey, 532 F.3d 150, 154–55 (2d Cir. 2008) (holding that "when a statute authorizes the Attorney General to make a determination, but lacks additional

If the particularly serious crime determination really was "inherently discretionary" the circuit courts would not have jurisdiction to overrule a finding that a crime is particularly serious, as the INA strips jurisdiction from the federal appellate courts over decisions "specified" by the statute to be under the discretion of the Attorney General.[237] The Third Circuit, the Second Circuit, and the Sixth Circuit have all determined that if Congress intended to place the discretion to make the "particularly serious" determination exclusively in the hands of immigrations judges and the BIA it would have employed the same explicit language used in other provisions of the same Act which explicitly reference "discretion."[238]

Assuming that the circuit courts discussed above correctly found that the particularly serious crime assessment is not inherently discretionary, applying the categorical approach would help to promote uniformity and predictability, two advantages over the current particularly serious crime bar. This interpretation of the statute could save it from being found unconstitutionally vague,[239]

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language specifically rendering that determination to be within his discretion . . . the decision is not one that is 'specified . . . to be in the discretion of the Attorney General'"); Alaka v. Att'y Gen. of the United States, 456 F.3d 88, 96–100 (3d Cir. 2006) (holding that the particularly serious crime decision is not unreviewable).

237. 8 U.S.C. § 1252(a)(2)(B)(ii) ("[A]ny other decision or action of the Attorney General or the Secretary of homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General of the Secretary of Homeland Security.").

238. *See Alaka*, 456 F.3d at 97–100 (holding that the particularly serious crime decision is not unreviewable); *see also* Berhane v. Holder, 606 F. 3d 819, 821–22 (6th Cir. 2010) (holding that the INA does not strip jurisdiction regarding serious crime determinations); *Nethagani*, 532 F.3d at 154–55 (holding that "when a statute authorizes the Attorney General to make a determination, but lacks additional language specifically rendering that determination to be within his discretion . . . the decision is not one that is 'specified . . . to be in the discretion of the Attorney General'"). The Ninth Circuit also agreed that the particularly serious crime determination is reviewable, but has decided that the proper standard of review is "abuse of discretion." *See Arbid*, 700 F.3d at 383–85 (finding that the BIA has full discretion only when Congress has explicitly stated as much); *see also Delgado*, 648 F.3d at 1100 (9th Cir. 2011) (stating a court may review BIA action when Congress has not explicitly barred the court from doing so). These different standards of review reflect confusion over whether the particularly serious crime determination is a legal conclusion, a mixed question of law and fact, a factual finding, or an entirely discretionary decision.

239. *See* Marouf, *supra* note 86, at 1450 (advocating for a categorical approach to the particularly serious crime determination).

especially as the particularly serious crime bar is the only bar post-conviction relief that does not apply the categorical approach.[240]

Under the canon of constitutional avoidance, it is courts' plain duty to adopt any reasonable construction of a statute that escapes constitutional problems.[241] The application of the categorical approach could potentially solve some of the vagueness issues that exist in the particularly serious crime bar.

2. Additional Considerations

If the categorical approach is determined to not be feasible, the additional considerations discussed below would serve to minimize the arbitrary and discriminatory enforcement of the residual clauses of the particularly serious crime bar, if enacted to any of the proposals in Section III.B satisfying notice concerns.

a. Mitigating Factors

A particularly serious crime determination "strips the Attorney General of all discretion to determine whether, considering all the circumstances, the individual who has committed an offense should be permitted to remain in the country."[242] The constraint on considering mitigating factors in determining what qualifies as a particularly serious crime is shown in *Matter of N-A-M-* and *Matter of R-A-M-*.[243] The BIA stated in *N-A-M-* that since "offender characteristics may operate to reduce a sentence but do not diminish the gravity of a crime," they are not relevant to the particularly serious crime analysis.[244] The BIA found in *Matter of R-A-M-* that "potential rehabilitation is not significant to the [particularly serious crime] analysis." [245] In *Delgado*, Justice Reinhardt's dissent clarifies that "[i]f a[] [non-citizen's] offense is deemed particularly serious, the Attorney General loses his ability to consider a host of relevant discretionary factors," such as both physical and mental health.[246]

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240. *Id.* at 1429.

241. Sessions v. Dimaya, 138 S. Ct. 1204, 1216 (2018).

242. Delgado v. Holder, 648 F.3d 1095, 1109 (9th Cir. 2011).

243. Matter of N-A-M-, 24 I. & N. Dec. 336 (B.I.A. 2007); Matter of R-A-M-, 25 I. & N. Dec. 657 (B.I.A. 2012).

244. Matter of N-A-M-, 24 I. & N. Dec. 336, 343 (B.I.A. 2007).

245. Matter of R-A-M-, 25 I. & N. Dec. 657, 662 (B.I.A. 2012).

246. *Delgado*, 648 F.3d at 1104 (listing the factors the Attorney General is thus unable to consider as: whether the non-citizen has served in the U.S. Armed

The consideration of these factors should not be lost with a particularly serious crime determination, which currently acts as a total bar to relief, regardless of how overwhelmingly in favor of remaining the factors may be for a non-citizen.

Recently, related to mental health status, the Attorney General in *Matter of B-Z-R-*, held that "in some circumstances, a respondent's mental health condition may indicate that the respondent does not pose a danger to the community" and that "such evidence should not categorically be disregarded."[247] Thus, the BIA's decision in *Matter of G-G-S-* concluding that immigration judges were constrained by how mental health issues were handled by the criminal court, was overruled.[248] The BIA previously held that "all reliable information may be considered in making a particularly serious crime determination."[249] By explicitly excluding the consideration of mental health information, the BIA was contradicting its previous statement and violating international standards.[250] With *B-Z-R-*, the Attorney General brings mental health

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Forces; whether the non-citizen has been gainfully employed and for how long; whether the non-citizen has paid taxes; whether the non-citizen is the sole support of an American spouse and children; or whether any members of the non-citizen's American family are ill or in need of medical care that they would be unable to attain if the non-citizen is removed to a foreign land).

247. Matter of B-Z-R-, 28 I. & N. Dec. 563, 565–66 (A.G. 2022).

248. *Id.* at 567; Matter of G-G-S-, 26 I. & N. Dec. 339, 345 (B.I.A. 2014); Gomez-Sanchez v. Sessions, 892 F.3d 985, 990 (9th Cir. 2018) (holding that, in the Ninth Circuit, mental health was a mitigating factor and could be considered in the particularly serious crime analysis).

249. *N-A-M-*, 24 I. & N. Dec. at 337–38.

250. The BIA has justified this contradiction by saying that immigration judges do not have the power to reassess criminal culpability. *See* Marouf, *supra* note 86, at 1463; *G-G-S-*, 26 I. & N. Dec. at 345. However, taking into account mental health status and other offender characteristics has no effect on criminal culpability. Criminal culpability has already been determined, and so this consideration only impacts the effect that the culpability has on the non-citizen's continued residence. *See Gomez-Sanchez*, 892 F.3d at 990. The court also took issue with the BIA's assumption that considering mental health-related evidence "would undermine the criminal court's findings by requiring the Board to reassess those findings." *Id.* at 993; *see also* Matter of G-G-S-, 26 I. & N. Dec. 339 (B.I.A. 2014). The Court stated that "considering mental health-related evidence, like consideration of other underlying facts and circumstances surrounding a crime, does not require [Immigration Judges] to assess criminal culpability or the validity of the conviction." *Gomez-Sanchez*, 892 F.3d at 993. Since the Immigration Judge is a fact-finder focused on the question of dangerousness, they may "consider this evidence," as they are not "retrying the question of guilt but

consideration into alignment across all circuits, as the Eighth and Ninth Circuits had previously determined that the decision of the BIA in *G-G-S-*, applying a blanket rule against considering an individual's mental health, was contrary to the clearly expressed intent of Congress.[251] This was because "such categorical rules undermine the ability of the agency to conduct a case-by-case analysis in each case."[252] However, mental health status is still not a mandated requirement under a particularly serious crime determination, it is simply permitted.[253]

There are compelling reasons why mental health ought to be mandated when making a particularly serious crime determination. Mental health evidence may have never been presented to the criminal court, and at sentencing judges may choose to exercise their discretion and not consider mental illness.[254] Thus, mental health evidence that the individual wishes to present in immigration court may not have been previously heard or considered.[255]

The Ninth Circuit has emphasized the importance of considering mental health status, as mental illness "might impact . . . intent. "[256] The Attorney General in *B-Z-R-* stated that "(t)he Board provided no sound reason why mental health evidence should be treated differently from other evidence pertinent to a respondent's mental state." [257] It should be mandatory to consider mental health status as a mitigating factor and a part of the particularly serious crime determination, either prior to the particularly serious crime determination, or during the analysis of the crime's seriousness to help combat the risk of arbitrary and discriminatory enforcement.

b. Dangerousness

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assessing whether the circumstances of the crime are so serious as to justify removal to a country where there is a significant risk of persecution." *Id.* at 994.

251. *Gomez-Sanchez*, 892 F.3d at 989 (*citing G-G-S-*, 26 I. & N. Dec. at 339, 347); Shazi v. Wilkinson, 988 F.3d 441, 448–50 (8th Cir. 2021).

252. *Gomez-Sanchez*, 892 F.3d at 992.

253. Matter of B-Z-R-, 28 I. & N. Dec. 563, 565–67 (A.G. 2022).

254. Gomez-Sanchez v. Sessions, 892 F.3d 985, 994 (9th Cir. 2018). *Id.* at 665–66.

255. *Id.*

256. Gomez-Sanchez v. Sessions, 892 F.3d 985, 996 (9th Cir. 2018) (citing Matter of Ajami, 22 I. & N. Dec. 949, 950 (B.I.A. 1999)).

257. Matter of B-Z-R-, 28 I. & N. Dec. 563, 567 (A.G. 2022).

The BIA dropped dangerousness as a distinct requirement for the particularly serious crime determination in *Matter of Carballe*.[258] Practically, this means that individuals who pose no present or future risk to society may be deported to countries where they face serious risk of harm or death.[259] Evidence of rehabilitation would be particularly relevant to any kind of dangerousness analysis, but the BIA has not applied any kind of rebuttable dangerousness presumption, finding evidence of rehabilitation irrelevant to the particularly serious crime analysis.[260] Examples of instances where evidence of rehabilitation would combat an assumption of dangerousness are: where a non-citizen was suffering from mental illness and no longer presents a threat, as they have now entered or completed a treatment program; where a non-citizen was convicted of a drug-related offense but has now entered rehabilitation or is sober; or where a crime was committed under extreme emotional distress and this distress has been resolved.[261]

Considering evidence of rehabilitation would assist in ensuring that the particularly serious crime bar is correctly applied, and is not applied disproportionately to those who do not represent an ongoing danger to the community, helping to combat arbitrary and discriminatory enforcement concerns.[262]

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258. Matter of Carballe, 19 I. & N. Dec. 357 (B.I.A. 1986). *See supra* note 54 and accompanying text.

259. Marouf, *supra* note 86, at 1463; Mosquera-Perez v. I.N.S., 3 F.3d 553 (1st Cir. 1993) (noting the consequences of dropping a distinct dangerousness requirement as allowing someone who poses no present or future risk to be deported and face serious harm).

260. Matter of R-A-M-, 25 I. & N. Dec 657, 662 (B.I.A. 2012). "The BIA has not applied any type of rebuttable presumption of dangerousness based on a past conviction for a particularly serious crime. Evidence of rehabilitation would be highly relevant to rebutting this type of presumption, but, as mentioned above, the BIA has found such evidence irrelevant to the analysis." Marouf, *supra* note 86, at 1462.

261. These crimes may not be any indicator of present or future dangerousness. *See* Marouf, *supra* note 86, at 1462–63 (discussing the negative effects of dropping dangerousness as a requirement); Ahmetovic v. INS, 62 F.3d 48, 52–3 (2d Cir. 1995) (indicating that the court is "troubled by the BIA's failure to give separate consideration" to dangerousness involving this scenario of abused women).

262. *See* Marouf, *supra* note 86, at 1463 (offering some examples of situations where the failure to consider a past conviction in light of future dangerousness could result in decisions that may be viewed as unfair).

c. Proportionality

The principle of proportionality if applied in the immigration context would help protect someone from deportation to a country where they would be subject to a serious risk of persecution or death when it is disproportionate. Historically, the Supreme Court has applied the principle of proportionality in the civil context, in addition to the criminal context.[263] Unfortunately, the Supreme Court found the BIA's explicit rejection of allowing the definition of a particularly serious crime to "vary with the nature of evidence of persecution," to be reasonable in the immigration context and has chosen not to extend the principle of proportionality or the reasoning behind it.[264]

A number of European countries, including Sweden, Norway, and Belgium, take an alternative approach to the particularly serious crime bar where their commitment to non-refoulement is prioritized over the bar.[265] In these countries, adjudicators first assess whether a person meets the definition of a refugee, and only complete the particularly serious crime assessment following this determination.[266] Those who are found to have refugee status and are also found to have been convicted of a particularly serious crime are not able to obtain permanent status, but are given a type of renewable civil probation that allows them to remain in the country protected from deportation.[267] While it is unlikely that the US would ever accept a complete revocation of power from the particularly serious crime bar, it is important to consider that this treatment of the bar exists and

263. *See id.* at 146–66 (introducing the concept of proportionality in the Supreme Court's Eighth Amendment jurisprudence as it applies to criminal punishment and civil forfeiture); United States v. Halper, 490 U.S. 435, 447–49 (1989) *abrogated by* Hudson v. United States, 522 U.S. 93 (1997) (finding that a civil sanction that was overwhelmingly disproportionate to the damages caused constituted a second punishment in violation of the Double Jeopardy Clause); *see also* Austin v. United States, 509 U.S. 602, 622 (1993) (finding that civil forfeiture of property used or intended to be used in drug offenses is subject to proportionality review under the excessive fines clause).

264. Matter of Rodriguez-Coto, 19 I. & N. Dec. 208, 209 (B.I.A. 1985); *see also* INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (affirming the BIA's interpretation that the BIA is not required "to balance respondent's criminal acts against the risk of persecution" faced if the non-citizen was returned to their country of origin).

265. Rebecca Sharpless, *Balancing Future Harms: The "Particularly Serious Crime" Bar to Refugee Protection*, 69 FLA. L. REV. F. 27, 30 (2017).

266. *Id.*

267. *Id.*

that this approach would be much more in line with proportionality, helping to balance against arbitrary and discriminatory enforcement.

CONCLUSION

The ability of immigration judges to implement the particularly serious crime bar by absolute discretion is a dangerous concept, and can be life-altering for many non-citizens with criminal convictions. The BIA's current test for what constitutes a particularly serious crime leads to arbitrary and unpredictable decisions about which criminal convictions qualify to bar individuals from crucial deportation relief in dangerous situations. The legislative and adjudicative history, decisions received from the EOIR, and the misguided analysis in the Eighth and Ninth Circuit decisions all serve to show that the original mandate of the particularly serious crime bar—to be a narrow exception to the principle of non-refoulement—has crumpled. The "within the ambit" approach and the *Frentescu* factor test create an overly expansive exception to the international obligations of the US, and are far broader than what Congress meant to institute. The particularly serious crime bar is unconstitutionally vague, and its lack of notice, as well as its arbitrary enforcement creates uncertainty for a vulnerable population, laying waste to the promise of clarity and fairness encompassed by Due Process. Thus, the residual clauses of the particularly serious crime bar in both the asylum and withholding of removal context should be found unconstitutional and struck down.